

PROFESSIONAL RULES

Minnesota Rules of Professional Conduct

	PAGE
Table of Headnotes	1275
Text of Rules	1279
Index	1335

Rules on Lawyers Professional Responsibility

	PAGE
Table of Headnotes	1339
Text of Rules	1341
Index	1364

Lawyers Professional Responsibility Board Opinions

	PAGE
Table of Headnotes	1367
Text of Opinions	1367

Rules for Admission to the Bar

	PAGE
Table of Headnotes	1379
Text of Rules	1381
Index	1396

Character and Fitness Standards

	PAGE
Text of Standards	1398

Student Practice Rules

	PAGE
Table of Headnotes	1400
Text of Rules	1400

Rules of the Supreme Court for Registration of Attorneys

	PAGE
Table of Headnotes	1403
Text of Rules	1403
Index	1406

Rules of the Minnesota Board of Continuing Legal Education

	PAGE
Table of Headnotes	1407
Text of Rules	1408
Forms	1416
Index	1420

Rules of Lawyers Trust Account Board

	PAGE
Table of Headnotes	1422
Text of Rules	1422

Plan for the Minnesota State Board of Legal Certification

	PAGE
Table of Headnotes	1428
Text of Rules	1428

Internal Rules for the State Board of Legal Certification

	PAGE
Table of Headnotes	1432
Text of Rules	1432

Rules of the Minnesota Client Security Board

	PAGE
Table of Headnotes	1439
Text of Rules	1440

Code of Professional Responsibility for Interpreters in the Minnesota State Court System

	PAGE
Table of Canons	1446
Text of Canons	1446

Code of Judicial Conduct

	PAGE
Table of Canons	1453

Text of Canons 1453

Rules of Board on Judicial Standards

	PAGE
Table of Headnotes	1483
Text of Rules	1485
Index	1500

Grounds for Judicial Recall

	PAGE
Text of Rule	1503

Minnesota Rules of Professional Conduct

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TABLE OF HEADNOTES

PREAMBLE: A LAWYER'S RESPONSIBILITY

SCOPE

TERMINOLOGY

1. CLIENT-LAWYER RELATIONSHIP

- 1.1 Competence
- 1.2 Scope of Representation
- 1.3 Diligence
- 1.4 Communication
- 1.5 Fees
- 1.6 Confidentiality of Information
- 1.7 Conflict of Interest: General Rule
- 1.8 Conflict of Interest: Prohibited Transactions
- 1.9 Conflict of Interest: Former Client
- 1.10 Imputed Disqualification: General Rule
- 1.11 Successive Government and Private Employment
- 1.12 Former Judge, Arbitrator, or Law Clerk
- 1.13 Organization as Client
- 1.14 Client Under a Disability
- 1.15 Safekeeping Property
- 1.16 Declining or Terminating Representation
- 1.17 Sale of Law Practice

2. COUNSELOR

- 2.1 Advisor
- 2.2 Intermediary
- 2.3 Evaluation for Use by Third Persons

3. ADVOCATE

- 3.1 Meritorious Claims and Contentions
- 3.2 Expediting Litigation
- 3.3 Candor Toward the Tribunal
- 3.4 Fairness to Opposing Party and Counsel
- 3.5 Impartiality and Decorum of the Tribunal
- 3.6 Trial Publicity
- 3.7 Lawyer as Witness
- 3.8 Special Responsibilities of a Prosecutor
- 3.9 Advocate in Nonadjudicative Proceedings

4. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

- 4.1 Truthfulness in Statements to Others
- 4.2 Communication with Person Represented by Counsel
- 4.3 Dealing with Unrepresented Person
- 4.4 Respect for Rights of Third Persons

5. LAW FIRMS AND ASSOCIATIONS

- 5.1 Responsibilities of a Partner or Supervisory Lawyer
- 5.2 Responsibilities of a Subordinate Lawyer
- 5.3 Responsibilities Regarding Nonlawyer Assistants
- 5.4 Professional Independence of a Lawyer
- 5.5 Unauthorized Practice of Law
- 5.6 Restrictions on Right to Practice
- 5.7 Employment of Disbarred, Suspended, or Involuntarily Inactive Lawyers

6. PUBLIC SERVICE

- 6.1 Voluntary Pro Bono Publico Service
- 6.2 Accepting Appointments
- 6.3 Membership in Legal Services Organization
- 6.4 Law Reform Activities Affecting Client Interests

7. INFORMATION ABOUT LEGAL SERVICES

- 7.1 Communications Concerning a Lawyer's Services
- 7.2 Advertising and Written Communication
- 7.3 In-Person and Telephone Contact with Prospective Clients
- 7.4 Communication of Fields of Practice
- 7.5 Firm Names and Letterheads

8. MAINTAINING THE INTEGRITY OF THE PROFESSION

- 8.1 Bar Admission and Disciplinary Matters
- 8.2 Judicial and Legal Officials
- 8.3 Reporting Professional Misconduct
- 8.4 Misconduct
- 8.5 Jurisdiction

INDEX**PREAMBLE: A LAWYER'S RESPONSIBILITIES**

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and

disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a larger legal context shaping the law's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and prosecutors in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to

promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

TERMINOLOGY

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "Law Firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

"Fraud" or "Fraudulent" denotes conduct having purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

"Tribunal" includes all courts and all other adjudicatory bodies.

TEXT OF RULES

Rule 1. Client-Lawyer Relationship

1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill. *In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and expertise in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.*

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation. *Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.*

Maintaining Competence. *To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.*

1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c) and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment

Scope of Representation. *Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.*

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decision is to be guided by reference to Rule 1.14.

Independence From Client's Views or Attitudes. *Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.*

Services Limited in Objectives or Means. *The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.*

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions. *A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.*

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information. *In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.*

1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing

the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

(f) This Rule does not prohibit payment to a former partner or associate pursuant to a separation agreement.

Comment

General. Rule 1.5(a) and (e)'s requirement that a fee be "reasonable" is not intended to restrict attorneys from charging less than normal fees or charging no fee at all.

Basis or Rate of Fee. When the lawyer has regularly represented a client, they ordinarily have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment. A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee. *A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.*

Disputes over Fees. *If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.*

1.6 Confidentiality of Information

- (a) Except when permitted under paragraph (b), a lawyer shall not knowingly:
 - (1) reveal a confidence or secret of a client;
 - (2) use a confidence or secret of a client to the disadvantage of the client;
 - (3) use a confidence or secret of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.
- (b) A lawyer may reveal:
 - (1) confidences or secrets with the consent of the client or clients affected, but only after consultation with them;
 - (2) confidences or secrets when permitted under the Rules of Professional Conduct or required by law or court order;
 - (3) the intention of a client to commit a crime and the information necessary to prevent a crime;
 - (4) confidences and secrets necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;
 - (5) confidences or secrets necessary to establish or collect a fee or to defend the lawyer or employees or associates against an accusation of wrongful conduct;
 - (6) secrets necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. See Rule 8.3.

(c) A lawyer shall exercise reasonable care to prevent employees, associates and others whose services the lawyer utilizes from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (b) through an employee.

(d) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(Amended effective January 1, 1990; amended April 14, 1992, effective June 1, 1992.)

Comment—1991

General. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the lawyer to preserve confidences and secrets of one who has employed or sought to employ the lawyer. A client must feel free to discuss whatever the client wishes with the lawyer and a lawyer must be equally free to obtain information beyond what the client volunteers. A lawyer should be fully informed of all the facts of the matter the lawyer is handling in order for the client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of independent professional judgment to separate the relevant and important from the irrelevant and unimportant.

Observance of the lawyer's ethical obligation to hold inviolate the client's confidences and secrets not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Authorized Disclosure. The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when the client consents after consultation, when necessary to perform professional employment, when permitted by the Rules of Professional Conduct or when required by law.

The confidentiality required under this rule should not allow a client to utilize the lawyer's services in committing a criminal or fraudulent act. A lawyer is permitted to reveal the intention of a client to commit a crime and the information necessary to prevent the crime. In addition, where the lawyer finds out, after the fact, that the lawyer's services were used by the client to commit a criminal or fraudulent act, the lawyer has discretion to reveal information necessary to rectify the consequences of the client's crime or fraud. A lawyer is not permitted, however, to disclose a client's criminal or fraudulent act committed prior to the client's retention of the lawyer's services.

Unless the client otherwise directs, a lawyer may disclose the client's affairs to partners or associates.

It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved.

If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information.

A lawyer must always be sensitive to the client's rights and wishes and act scrupulously in making decisions which may involve disclosure of information obtained in the professional relationship. Thus, in the absence of the client's consent after consultation, a lawyer should not associate another lawyer in handling a matter; nor, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the client's identity

or confidences or secrets would be revealed to that lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning clients.

Unless the client otherwise directs, it is not improper for a lawyer to give limited information from the lawyer's files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in selecting the agency and warns the agency that the information must be kept confidential.

Protecting Confidences. The attorney-client privilege is more limited than the lawyer's ethical obligation to guard the client's confidences and secrets. The ethical obligation, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.

A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, the lawyer should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

Using Confidences or Secrets. A lawyer should not use information acquired in the course of the representation of a client to the client's disadvantage and a lawyer should not use, except with the client's consent after full disclosure, such information for the lawyer's own purposes.

Likewise, a lawyer should be diligent in efforts to prevent misuse of such information by employees and associates.

A lawyer should exercise care to prevent disclosure of confidences and secrets of one client to another and should accept no employment that might require such disclosure.

Former Client. The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the employment. Thus, a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve disclosure of confidences and secrets.

A lawyer should also provide for the protection of the client's confidences and secrets following the termination of the practice of the lawyer, whether termination is due to death, disability or retirement. For example, a lawyer might provide for the client's personal papers to be returned to the client and for the lawyer's papers to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the client's instructions and wishes should be a dominant consideration.

Reporting Obligation. In the course of representation a lawyer may acquire knowledge of another lawyer's violations of the Rules of Professional Conduct. In that instance, a lawyer's obligation to protect client confidences and secrets under Rule 1.6 may appear to conflict with that lawyer's obligations under Rule 8.3 to report professional misconduct by another lawyer. Where "confidences" are involved, the importance of the fiduciary relationship between lawyer and client and the proper functioning of the legal system require that the client retain the veto power over the lawyer's ability to divulge knowledge of another lawyer's violations of the Rules of Professional Conduct.

Until the Rules of Professional Conduct superseded the Code of Professional Responsibility in 1985, Minnesota lawyers were required to report professional misconduct only if their knowledge of the misconduct was "unprivileged." Until 1985, if a lawyer's knowledge of misconduct was a "secret," reporting was required; if the knowledge acquired involved a "confidence," reporting was not allowed, unless some other exception to the confidentiality rule applied. Since September 1, 1985, reporting of misconduct has been forbidden without client consent, if either a confidence or secret is involved.

Under subsection 1.6(b)(6), a lawyer now has the discretion to reveal "secrets," but not client confidences, when necessary to report the lawyer's knowledge of another lawyer's

misconduct. This subsection incorporates the language of Rule 8.3 as to the type of reportable misconduct, requiring that the misconduct "raise a substantial question" about the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

This discretion to report a lawyer's misconduct balances the policy of confidentiality with the legal profession's obligation to enforce high ethical standards. If the client consents to the lawyer reporting another lawyer's misconduct, no conflict exists between these two policies. Therefore, the lawyer with knowledge of another lawyer's misconduct should seek the client's permission to report the misconduct to the disciplinary authority.

When the client opposes such disclosure, the lawyer then must determine whether knowledge of the misconduct stemmed from a client confidence. If so, the confidentiality rule prevails: disclosure is prohibited. If the knowledge stemmed from a secret, however, the lawyer faces the discretionary decision whether to report the misconduct. Factors pertinent to the discretionary decision include the nature of the lawyer's misconduct, the likelihood that such misconduct will recur if not reported, the possible emotional harm to the client if required to testify in a disciplinary proceeding and/or the likelihood of recovery of embezzled funds.

Other factors that may merit consideration would be the ability to recover funds, such as through frozen assets or a client security fund, in which case, the client's preference might be given less weight.

(Amended effective January 1, 1990; amended April 14, 1992, effective June 1, 1992.)

1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Comment

Loyalty to a Client. *Loyalty is an essential element in the lawyer's relationship with a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.*

As general proposition, loyalty to a client prohibits undertaking representation directly

adverse to that client without the client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent. A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests. The lawyer's own interest should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation. Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representation of multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interest is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an

advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. Similarly, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service. *A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.*

Other Conflict Situations. *Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.*

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party. *Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.*

1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the client is notified in writing by the lawyer that independent counsel should be considered and is given a reasonable opportunity to seek the advice of independent counsel in the transaction;

(2) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; and

(3) the client consents to the transaction in a document separate from the transaction documents that specifies:

(i) whether the lawyer is representing or otherwise looking out for the client's interests in the transaction;

(ii) the nature of the lawyer's conflicting interests, if any; and

(iii) the reasonably foreseeable risks for the client from any conflict.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation or acceptance of compensation from another is impliedly authorized by the nature of the representation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, unless each client consents after consultation, including disclosure of the existence and nature of all the claims and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

(k) A lawyer shall not have sexual relations with a current client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced. For purposes of this paragraph:

(1) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.

(2) If the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client. In-house attorneys while representing governmental or corporate entities are governed by Rule 1.7(b) rather than by this rule with respect to sexual relations with other employees of the entity they represent.

(3) This paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client.

(4) If a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation and whether to charge any violation based on the allegations, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.

(Amended effective July 1, 1994; amended effective for all lawyer conduct occurring on or after August 1, 1999.)

Comment

Transactions Between Client and Lawyer. *As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would*

adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Confidential Information. Rule 1.8(b) is not intended to limit the circumstances in which confidential information may or must be revealed under Rule 1.6 or other applicable disclosure rules. Its purpose is merely to make clear that in a conflict of interest setting, a lawyer may not use confidential information to the disadvantage of the client for purposes of furthering either the lawyer's or other's interests.

Literary Rights. An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for Lawyer's Services. Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers. Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation. Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

This Rule is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

1.9 Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the

former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Comment

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interest of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of Rule 1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is associated, see Rule 1.10.

1.10 Imputed Disqualification: General Rule

(a) Except as provided in this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) unless there is no reasonably apparent risk that confidential information of the previously represented client will be used with material adverse effect on that client because:

(1) any confidential information communicated to the lawyer is unlikely to be significant in the subsequent matter;

(2) the lawyer is subject to screening measures adequate to prevent disclosure of the confidential information and to prevent involvement by that lawyer in the representation; and

(3) timely and adequate notice of the screening has been provided to all affected clients.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(Amended effective for all lawyer conduct occurring on or after August 1, 1999.)

Comment

Definition of "Firm". For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any former agreement between associated lawyers are relevant in determining whether they are a firm as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protec-

tions provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualification. *The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).*

Lawyers Moving Between Firms. *When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from reforming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.*

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality. *Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.*

Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions. *The second aspect of loyalty to client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interest in the same or related matters, so long as the conditions of Rule 1.10(b) and (c) concerning confidentiality have been met.*

1.11 Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer

is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Comment

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government services. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency or affected person will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if they believe the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

1.12 Former Judge, Arbitrator, or Law Clerk

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

This rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in

a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and all the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), a violation of law appears likely, the lawyer may resign in accordance with Rule 1.16 and, if the violation is criminal or fraudulent, may reveal it in accordance with the Rules of Professional Conduct.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it appears that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client. *An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.*

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the position equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of constituent that is in violation of

law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules. The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided to other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, or 3.3. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency. The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role. There are times when the organization's interest may be or becomes adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent and individual, and that discussion between the lawyer for the organization and the individual may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation. Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions. Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

1.14 Client Under a Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Comment

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(c).

1.15 Safekeeping Property

(a) All funds of clients or third persons held by a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable interest bearing trust accounts as set forth in paragraphs (d) through (g). No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds of the lawyer or law firm reasonably sufficient to pay service charges may be deposited therein.

(2) funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm must be deposited therein.

(b) A lawyer must withdraw earned fees and any other funds belonging to the lawyer or the law firm from the trust account within a reasonable time after the fees have been earned or entitlement to the funds has been established and the lawyer must provide the client or third person with: (i) written notice of the time, amount and the purpose of the withdrawal; and (ii) an accounting of the client's or third person's funds in the trust account. If the right of the lawyer or law firm to receive funds from the account is disputed by the client or third person claiming entitlement to the funds, the disputed portion shall not be withdrawn until the dispute is finally resolved. If the right of the lawyer or law firm to receive funds from the account is disputed within a reasonable time after the funds have been withdrawn, the disputed portion must be restored to the account until the dispute is resolved.

(c) A lawyer shall:

(1) promptly notify a client or third person of the receipt of the client's or third person's funds, securities, or other properties.

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them.

(4) promptly pay or deliver to the client or third person as requested the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive.

(d) Each trust account referred to in paragraph (a) shall be an interest bearing account in a bank, savings bank, trust company, savings and loan association, savings association, or federally regulated investment company selected by a lawyer in the exercise of ordinary prudence.

(e) A lawyer who receives client or third person funds shall maintain a pooled interest bearing trust account for deposit of funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of any transaction costs, shall be paid to the Lawyer Trust Account Board established by the Minnesota Supreme Court.

(f) All client or third person funds shall be deposited in the account specified in paragraph (e) unless they are deposited in a:

(1) separate interest bearing trust account for the particular third person, client or client's matter on which the interest, net of any transaction costs, will be paid to the client or third person; or

(2) pooled interest bearing trust account with subaccounting which will provide for computation of interest earned by each client's or third person's funds and the payment thereof, net of any transaction costs, to the client.

(g) In determining whether to use the account specified in paragraph (e) or an account specified in paragraph (f), a lawyer shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be deposited;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services;

(3) the capability of financial institutions described in paragraph (d) to calculate and pay interest to individual clients.

(h) Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis, books and records sufficient to demonstrate income derived from, and expenses related to, the lawyer's private practice of law, and to establish compliance with paragraphs (a) through (f). The books and records shall be preserved for at least six years following the end of the taxable year to which they relate or, as to books and records relating to funds or property of clients or third persons, for at least six years after completion of the employment to which they relate.

(i) Every lawyer subject to paragraph (h) shall certify, in connection with the annual renewal of the lawyer's registration and in such form as the Clerk of the Appellate Court may prescribe, that the lawyer or the lawyer's law firm maintains books and records as required by paragraph (h).

(j) Lawyer trust accounts shall be maintained only in financial institutions approved by the Office of Lawyers Professional Responsibility.

(k) A financial institution shall be approved as a depository for lawyer trust accounts if it shall file with the Office of Lawyers Professional Responsibility an agreement, in a form provided by the Office, to report to the Office in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Lawyers Professional Responsibility Board shall establish rules governing approval and termination of approved status for financial institutions, and shall annually publish a list of approved financial institutions. No trust account shall be maintained in any financial institution which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon three days' notice in writing to the Office.

(l) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors.

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby.

Such reports shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within (5) banking days of the date of presentation for payment against insufficient funds.

(m) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(n) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the report and records required by this rule.

(o) DEFINITIONS

"Financial Institution" - includes banks, savings and loan associations, savings banks and any other business or person which accepts for deposit funds held in trust by lawyers.

"Properly payable" - refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

"Notice of dishonor" - refers to the notice which a financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument which the institution dishonors.

(Amended effective January 1, 1990; amended effective for all lawyer conduct occurring on or after August 1, 1999.)

Comment

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;
- (3) the lawyer is discharged; or
- (4) the client persists in a course of action using the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) the client has used the lawyer's services to perpetrate a crime or fraud;
- (2) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (3) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (4) the representation has been rendered unreasonably difficult by the client;

or

- (5) other good cause for withdrawal exists.

(c) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

Comment

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal. *A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.*

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge. *A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.*

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal. *A lawyer may withdraw from representation in some circumstances. Withdrawal is permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.*

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal. *Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.*

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

1.17 Sale of Law Practice

(a) A lawyer shall not sell or buy a law practice unless:

(1) the seller sells the practice as an entirety, as defined in paragraph (c) of this Rule, to a lawyer or firm of lawyers licensed to practice law in Minnesota;

(2) the seller sends a written notification that complies with paragraph (d) of this Rule to all clients whose files are currently active and all clients whose inactive files will be taken over by the buying lawyer or firm of lawyers.

(b) The buying lawyer or firm of lawyers shall not increase the fees charged to clients by reason of the sale for a period of at least one year from the date of the sale. The buying lawyer or firm of lawyers shall honor all existing fee agreements for at least one year from the date of the sale and shall continue to completion, on the same terms agreed to by the selling lawyer and the client, any matters that the selling lawyer has agreed to do on a *pro bono publico* basis or for a reduced fee.

(c) For purposes of this Rule, a practice is sold as an entirety if the buying lawyer or firm of lawyers assumes responsibility for at least all of the currently active files except those that deal with matters that the buying lawyer or firm of lawyers would not be competent to handle, those that the buying lawyer or firm of lawyers would be barred from handling because of a conflict of interest, or those from which the selling lawyer is denied permission to withdraw by a tribunal in a matter subject to Rule 1.16(c).

(d) The written notification that the selling lawyer must send pursuant to paragraph (a)(2) of this Rule must include at a minimum:

(1) a statement that the law practice of the selling lawyer has been sold to the buying lawyer or law firm;

(2) a summary of the buying lawyer's or law firm's professional background, including education and experience and the length of time that the buying lawyer or members of the buying law firm has been in practice;

(3) a statement that the client has the right to continue to retain the buying lawyer under the same fee arrangement as the client had with the selling lawyer or to have the client's complete file sent to the client or to another lawyer of the client's choice.

(e) If the written notification described in paragraph (d) has actually reached the client through personal service or by certified mail, the notification may include a provision that states that if the client does not respond to the buying lawyer by ninety days from the date that the client receives the notification, the client's silence shall be deemed to be the client's waiver of confidentiality and the client's consent to the buying lawyer's representing the client in the matter that was the subject of the selling lawyer's representation. The client's failure to respond within that time shall be such a waiver and consent.

(f) The transaction may include a promise by the selling lawyer that the selling lawyer will not engage in the practice of law for a reasonable period of time within a reasonable geographic area and will not advertise for or solicit clients within that area for that time.

(g) The selling lawyer shall retain responsibility for the proper management and disposition of all inactive files that are not transferred as part of the sale of the law practice.

(h) For purposes of this Rule, the term "lawyer" means an individual lawyer or a law firm that buys or sells a law practice.

(Added effective January 1, 1996.)

Comment

A representative of a deceased, disabled or disappeared lawyer may sell the lawyer's law practice under the same restrictions as imposed by this Rule. See Rule 5.4(a)(4).

Rule 1.6 on Confidentiality of Information limits the amount and type of information that the selling lawyer may give to the potential buying lawyer during negotiations. Before the prospective buyer could see the client files the selling lawyer would be required to obtain from the affected client a waiver of confidentiality.

The selling lawyer should consider extending malpractice insurance for some reasonable period of time following the sale to insure against losses arising from errors that might come to light after the sale.

(Added effective January 1, 1996.)

Rule 2. Counselor

2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice. *A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.*

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility, as advisor, may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice. *In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.*

2.2 Intermediary

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Comment

A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interest. The alternative can be that each party may have to obtain separate representation with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional costs, embarrassment and recrimination. In some situations the risk of failure is so great that the intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the client's interest are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege. *A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.*

Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Withdrawal. *Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.*

2.3 Evaluation for Use by Third Persons

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation or the evaluation is impliedly authorized by the nature of the representation of the client.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition. *An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of the prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.*

Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with a vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if

the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person. *When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.*

Access to and Disclosure of Information. *The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the term of the client's agreement and the surrounding circumstances.*

Financial Auditors' Requests for Information. *When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.*

Rule 3. Advocate

3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

The advocate has a duty to use legal procedure for the fullest benefits of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith

argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer. *An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), see the Comment to that Rule. See also the Comment to Rule 8.4(b).*

Misleading Legal Argument. *Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a*

disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence. When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant. Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because of the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(c).

Remedial Measures. If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that

fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue; and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements. *The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. The obligation of the advocate under these Rules is subordinate to such constitutional requirements.*

Refusing to Offer Proof Believed to Be False. *Generally speaking a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may be denied this authority by constitutional requirements governing the right to counsel.*

Ex Parte Proceedings. *Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.*

3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed.

With regard to paragraph (b), it is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

3.5 Impartiality and Decorum of the Tribunal

(a) Before the trial of a case, a lawyer connected therewith shall not, except in the course of official proceedings, communicate with or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.

(b) During the trial of the case:

(1) a lawyer connected therewith shall not, except in the course of official proceedings, communicate with or cause another to communicate with any member of the jury.

(2) a lawyer who is not connected therewith shall not, except in the course of official proceedings, communicate with or cause another to communicate with a juror concerning the case.

(c) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.

(d) A lawyer shall not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a juror or prospective juror.

(e) All restrictions imposed by this rule apply also to communications with or investigations of members of a family of a juror or prospective juror.

(f) A lawyer shall reveal promptly to the court improper conduct by, or by another toward, a juror or prospective juror or a member of the family thereof, of which the lawyer has knowledge.

(g) In an adversary proceeding a lawyer shall not communicate or cause another to communicate as to the merits of the case with the judge or an official before whom a proceeding is pending except:

(1) in the course of official proceedings.

(2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if the party is not represented by a lawyer.

(3) orally upon adequate notice to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.

(4) as otherwise authorized by law.

(h) A lawyer shall not engage in conduct intended to disrupt a tribunal.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can prevent the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

3.6 Trial Publicity

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing a pending criminal jury trial.

Comment

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

3.7 Lawyer as Witness

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness, except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

(Amended July 16, 1987.)

3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel, and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent employees or other persons assisting or associated with the prosecutor in a criminal case and over whom the prosecutor has direct control from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Comment

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative or administrative body in a nonadjudicative proceeding shall disclose that the appearance is in a representative

capacity and shall conform to the provisions of Rules 3.3(a) through (c), and 3.4(a) through (c).

Comment

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with it honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

Rule 4. Transactions with Persons other than Clients

4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly make a false statement of fact or law.

4.2 Communication with Person Represented by Counsel

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

(Amended to govern all lawyer disciplinary actions commenced on or after January 1, 1995.)

Comment

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

4.3 Dealing with Unrepresented Person

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall clearly disclose whether the client's interests are adverse to the interests of such person and shall not state or imply that the lawyer is disinterested.

(b) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(c) During the course of representation of a client a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, on those issues as to which the interests of each person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.

4.4 Respect for Rights of Third Persons

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Comment

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

Rule 5. Law Firms and Associations

5.1 Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was not direction, ratification or knowledge of the violation.

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer might be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and subordinate may be guided accordingly. For example, if a

question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer the proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional firm or association authorized to practice law for a profit, if a nonlawyer:

(1) owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of a lawyer for a reasonable time during administration;

(2) possesses governance authority, unless permitted by the Minnesota Professional Firms Act; or

(3) has the right to direct or control the professional judgment of a lawyer.

(Amended effective January 1, 1996; amended effective for all lawyer conduct occurring on or after August 1, 1999.)

Comment

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, the arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

5.5 Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where to do so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Comment

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

Comment

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits from service with the firm.

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

(Amended effective January 1, 1996.)

5.7 Employment of Disbarred, Suspended, or Involuntarily Inactive Lawyers

(a) For purposes of this rule "employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid.

(b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know has been disbarred, suspended, or placed on disability inactive status by order of the court to do any of the following on behalf of the lawyer's client:

- (1) render legal consultation or advice to the client;
- (2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer unless the rules of the tribunal involved permit representation by non-lawyers and the client has been informed of the lawyer's suspension, disbarment, or disability inactive status;
- (3) appear as a representative of the client at a deposition or other discovery matter;
- (4) negotiate or transact any matter for or on behalf of the client with third parties;
- (5) receive, disburse or otherwise handle the client's funds; or
- (6) engage in activities that constitute the practice of law.

(c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, or disability inactive lawyer to perform research, drafting, clerical, or similar activities, including but not limited to:

- (1) legal work of a preparatory nature for the lawyer's review, such as legal research, the gathering of information, drafting of pleadings, briefs, and other similar documents;
- (2) direct communication with the client or third parties regarding matters such as scheduling, billing, updates, information gathering, confirmation of receipt or sending of correspondence and messages; or
- (3) accompanying an active lawyer in attending a deposition or other discovery procedure for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.

(d) Prior to or at the time of employing a person the lawyer knows or reasonably should know is a disbarred, suspended, or disability inactive lawyer, the lawyer shall serve upon the Office of Lawyers Professional Responsibility written notice of the employment, including a full description of such person's current license status. The notice shall state that the suspended, disbarred, or disability inactive lawyer shall not be employed to perform any of the activities prohibited by paragraph (b).

(e) Upon termination of the employment of the disbarred, suspended, or disability inactive lawyer, the employing lawyer shall promptly serve upon the Office of Lawyers Professional Responsibility written notice of the termination.

(Added effective for all lawyer conduct occurring on or after August 1, 1999.)

Rule 6. Public Service

6.1 Voluntary Pro Bono Publico Service

A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to:

- (1) persons of limited means or
- (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

- (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect the civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
- (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
- (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

(Amended effective January 1, 1996.)

Comment—1985

The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

Comment—1995

Every practicing lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. All practicing lawyers should aspire to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer than 50 hours but during the course of a legal career, each lawyer should aspire to render an average of 50 hours of service per year. Services can

be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction, death penalty appeal cases.

Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually be furnished to the disadvantaged without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rulemaking and the provision of free training or mentoring to those who represent persons of limited means and otherwise contributing legal talents. The variety of these activities should facilitate participation by government attorneys, even when restrictions exist on their engaging in the outside practice of law.

Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remain unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory, or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono attorney to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

Paragraph (b)(2) covers instances in which attorneys agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may

discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

(Added effective January 1, 1996.)

6.2 Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel. *For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.*

An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

6.3 Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

6.4 Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose the fact but need not identify the client.

Comment

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

Rule 7. Information about Legal Services

7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact of law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
- (c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

Comment

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful.

7.2 Advertising and Written Communication

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media or through written communication.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule, may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization, and may pay for a law practice that is sold in accordance with Rule 1.17.

(d) Any communication made pursuant to this Rule shall include the name of at least one licensed Minnesota lawyer responsible for its content if the legal services advertised are to be performed in whole or in part in Minnesota.

(e) Advertisements and written communications indicating that the charging of a fee is contingent on outcome must disclose that the client will be liable for expenses regardless of outcome, if the lawyer so intends to hold the client liable.

(f) The word "ADVERTISEMENT" must appear clearly and conspicuously at the beginning of any written solicitation to a prospective client with whom the lawyer has no family or prior professional relationship and who may be in need of specific legal services because of a condition or occurrence that is known to the soliciting lawyer.

(g) Every lawyer associated with or employed by a law firm which causes or makes a communication in violation of this Rule may be subject to discipline for failure to make reasonable remedial efforts to bring the communication into compliance with this rule.

(Amended effective January 1, 1990; amended effective August 31, 1993; amended effective January 1, 1996.)

Comment

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references, and with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising. Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer. A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

7.3 In-Person and Telephone Contact with Prospective Clients

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by in-person or telephone contact, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(Amended effective August 31, 1993.)

Comment

There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and over-reaching. This potential for abuse inherent in direct solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising permitted under the Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.

The use of general advertising to transmit information from lawyer to prospective client, rather than direct private contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. This informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 7.1. Direct, private communications from a lawyer to a prospective client are not subject to such third-scrutiny and consequently are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

7.4 Communication of Fields of Practice

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing the lawyer's or the lawyer's firm's practice or in indicating its nature or limitations.

(b) A lawyer shall not state that the lawyer is a specialist in a field of law unless the lawyer is currently certified or approved as a specialist in that field by an organization that is approved by the State Board of Legal Certification.

(c) A lawyer shall not state that the lawyer is a certified specialist if the lawyer's certification has terminated, or if the statement is otherwise contrary to the terms of such certification.

(d) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(e) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(Amended effective January 1, 1996.)

7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall

indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

Rule 8. Maintaining the Integrity of the Profession

8.1 Bar Admission and Disciplinary Matters

(a) An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (1) knowingly make a false statement of material fact;
- (2) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter;
- (3) knowingly fail to respond to an admission or discipline authority's lawfully authorized demand for information by either providing the information sought or making a good faith challenge to the demand.

(b) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of the state Constitution. A person relying on such a provision in response to a question, however, should do so openly. See Rule 3.4(c).

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

8.2 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a

judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Lawyers Professional Responsibility.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Board on Judicial Standards.

(c) This Rule does not require disclosure of information that Rule 1.6 requires or allows a lawyer to keep confidential or information gained by a lawyer or judge while participating in a lawyers assistance program or other program providing assistance, support or counseling to lawyers who are chemically dependent or have mental disorders.

(Amended April 14, 1992, effective June 1, 1992; amended effective July 1, 2000.)

Comment—2000

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests. See the comment to Rule 1.6.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of the Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in a bona fide lawyers assistance program or other program that provides assistance, support or counseling to lawyers, including lawyers and judges who may be impaired due to chemical abuse or dependency, behavioral addictions, depression or other mental disorders. In that circumstance, providing for the confidentiality of information obtained by a lawyer-participant encourages lawyers and judges to participate and seek treatment through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in additional harm to themselves, their clients, and the public. The Rule therefore exempts lawyers participating in such programs from the reporting obligation of paragraphs (a) and (b) with respect to information they acquire while participating. A lawyer exempted from mandatory reporting under part (c) of the Rule may nevertheless report misconduct in the lawyer's discretion, particularly if the impaired lawyer or judge indicates an intent to engage in future illegal activity, for example, the conversion of client funds. See the comments to Rule 1.6.

(Amended April 14, 1992, effective June 1, 1992; amended effective July 1, 2000.)

8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities; or
- (h) commit a discriminatory act, prohibited by federal, state or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities.

(Amended effective January 1, 1990; amended April 14, 1992, effective June 1, 1992.)

Comment—1991

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to the practice of law. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee,

executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Paragraph (g) specifies a particularly egregious type of discriminatory act—harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status. What constitutes harassment in this context may be determined with reference to antidiscrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly.

Harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status may violate either paragraph (g) or paragraph (h). The harassment violates paragraph (g) if the lawyer committed it in connection with the lawyer's professional activities. Harassment, even if not committed in connection with the lawyer's professional activities, violates paragraph (h) if the harassment (1) is prohibited by antidiscrimination legislation and (2) reflects adversely on the lawyer's fitness as a lawyer, determined as specified in paragraph (h).

Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities.

Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances, including the four factors listed in paragraph (h). It is not required that the listed factors be considered equally, nor is the list intended to be exclusive. For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. See, e.g., *Minnesota Statutes*, section 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly).

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(c)(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

(Amended effective January 1, 1990; amended April 14, 1992, effective June 1, 1992.)

8.5 Jurisdiction

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

Comment

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in the jurisdiction. See Rule 5.5.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority

of the states to regulate the practices of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

INDEX - PROFESSIONAL CONDUCT

ADMINISTRATIVE AGENCIES

Appearance before
Attorneys, duties, 3.9

ADMISSION TO BAR

Applicants
False statements, prohibited, 8.1

ADVERTISEMENTS

Restrictions
Generally, 7.2
Written communications
Record keeping, requirements, 7.2

AFFIDAVITS

Attorneys
Documents prepared for litigation
Candor, requirements, 3.3

ARBITRATION

Arbitrators
Former arbitrators
Disqualification, requirements, 1.12

ATTORNEY FEES

Contingency fees
Advertisements, restrictions, 7.2
Certain actions, prohibited, 1.5
Requirements, 1.5

Fee agreements

Honoring, requirements
Sale of law practice, 1.17

Fee splitting

When permitted, 1.5, 5.4

Increase

Restrictions
Sale of law practice, 1.17

Pro bono publico legal services

Generally, 6.1

Reasonableness

Determination, factors, 1.5

ATTORNEYS

Admiralty attorneys
Use of term in communications, restrictions, 7.4

Admission to bar

Applicants
False statements on behalf of, prohibited, 8.1

Advertisements, see ADVERTISEMENTS**Agreements by**

Literary or media rights to client case information,
restrictions, 1.8

Malpractice liability, limiting
Prohibition, 1.8

Non-competition

Sale of law practice, 1.17
Restrictions on right to practice law, prohibited, 5.6

Appointed counsel

Acceptance of appointment
Requirements, generally, 6.2

Refusal of appointment

Grounds, 6.2

Appointments by

Guardians
Clients with disabilities, duties, 1.14

Bookkeeping

Requirements, 1.15

Certificates and certification

Bookkeeping, 1.15
Specialists, area of practice, 7.4

Clients

Appointment to represent
Accepting, requirements, generally, 6.2
Refusal, grounds, 6.2

Client information

Former clients, 1.9
Use to client's disadvantage, restrictions, 1.8

Clients' funds

Safekeeping duties, 1.15

ATTORNEYS (Cont'd)**Clients (Cont'd)**

Communications concerning lawyer's services
False or misleading statements, prohibited, 7.1

Discharge by

Generally, 1.16

Interests

Law reform activities of lawyers affecting, 6.4

Intermediaries, attorneys acting as, 2.2

Notice received

Sale of law practice, 1.17

Payments to

Client funds, 1.15

Relationship with, see **CLIENT-LAWYER
RELATIONSHIP**

Conflicts of interest

General rule, 1.7

Prohibited transactions, generally, 1.8

Consent

Communication of client with another lawyer, 4.2

Reporting and production requirements

Lawyer trust accounts, 1.15

Courts

Candor toward, requirements, 3.3

Communication with judges

Restrictions and requirements, 3.5

Disbarred attorneys

Employment by other attorneys, 5.7

Discipline**Advertisements**

Failure to comply with rules, 7.2

Failure to respond to inquiry, prohibited, 8.1

Jurisdiction, 8.5

Disclosure**Clients****Interests**

Law reform activities affecting, requirements, 6.4

Confidential information

Candor toward court, application of rules, 3.3

Violation of rules of professional conduct, exception, 8.3

When permitted, 1.6

Legal authority

Adverse to client's position, requirements, 3.3

Necessity

Avoidance of fraudulent or criminal act by client, 3.3

Representative capacity

Appearance before legislature, state agencies, or
administrative bodies, 3.9

Documents

Destruction or concealment, prohibited, 3.4

Documents prepared for litigation

Candor, requirements, 3.3

Ex parte proceedings

Candor toward court, requirements, 3.3

False statements**Fact or law**

Prohibited, 4.1

Lawyer's services

Prohibited, 7.1

Former arbitrators

Disqualification, 1.12

Former judges

Disqualification, 1.12

Former law clerks

Disqualification, 1.12

Gifts

Instruments gifting to attorney or relatives, preparing,
prohibited, 1.8

Government lawyers

Successive private employment, 1.11

Involuntary inactive attorneys

Employment by other attorneys, 5.7

Juries, contact with jurors or prospective jurors, see **JURIES**

ATTORNEYS (Cont'd)**Law firms****Attorneys working in**

Attorney in firm acting as witness where another lawyer in firm is advocate, 3.7

Client loyalty, requirements, 1.10

Ethical conduct

Partners or supervisory lawyers, responsibilities, 5.1

Subordinate lawyers, responsibilities, 5.2

Serving as witness when other attorney is advocate, 3.7

Defined, 1.10

Disqualification

Former arbitrators, 1.12

Former judges, 1.12

Former law clerks, 1.12

Former partners or associates, 1.10

General rule, 1.10

Government lawyers, successive private employment, 1.11

Employment of disbarred, suspended, or involuntarily inactive attorneys, 5.7

Firm name, use

Restrictions, 7.5

Former partners or associates**Disqualification**

General rule, 1.10

Payments to, 1.5

Letterhead, use

Restrictions, 7.5

Multiple jurisdictions

Firm name, use, 7.5

Identification of lawyers licensed in specific jurisdictions, 7.5

Partners

Ethical conduct of partners and employees, responsibilities for, 5.1

Trade name, use

Restrictions, 7.5

Trust accounts, see Lawyer trust accounts under this topic

Lawsuits

Advocacy, duties, 3.1

Candor, requirements, generally, 3.3

Expediting, requirements, 3.2

Frivolous lawsuits

Prohibition against, 3.1

Lawyer trust accounts

Definitions, 1.15

Deposits to, 1.15

Interest bearing, requirements, 1.15

Pooled accounts, requirements, 1.15

Separate accounts, requirements, 1.15

Types of accounts permitted, 1.15

Withdrawals from

Earned fees, requirements, 1.15

Legal profession

Integrity, maintaining, duties

Generally, 8.1, 8.2

Liability

Malpractice claims, 1.8

Licenses**Renewal**

Annual, requirements, 1.15

Misconduct

Defined, 8.4

Reporting, duties, requirements, 8.3

Notice given

Receipt of clients' funds, securities, or property, 1.15

Sale of law practice, 1.17

Transactions with clients, 1.8

Opinions

Use by third persons, 2.3

Partnerships

Nonlawyers, partnerships prohibited, 5.4

Restrictions on right to practice law, prohibited, 5.6

Patent attorneys

Use of term in communications, restrictions, 7.4

Payments by

Client funds, securities or property

Payment or delivery to client, 1.15

ATTORNEYS (Cont'd)**Payments to**

Compensation from persons other than client, restriction, 1.8

Practice of law**Areas of practice**

Communications concerning, restrictions, 7.4

Restrictions on

Prohibited, 5.6

Pro bono publico legal services

Annual requirements, 6.1

Pro se parties

Dealing with, duties, 4.3

Professional conduct, rules of

Binding effect, 5.2

Professional independence

Nonlawyers, ownership in professional corporation, 5.4

Requirements, generally, 5.4

Proprietary interest in cause of action

Acquisition, restrictions, 1.8

Prosecutors, see PROSECUTORS**Record keeping**

Advertisements, requirements, 7.2

Registration**Renewal**

Annual, requirements, 1.15

Relatives

Gift instruments gifting to attorney or relatives, preparing, prohibited, 1.8

Relatives who are lawyers

Representation of clients with adverse interest, restrictions, 1.8

Reports given**Attorney misconduct**

Duties, generally, 8.3

Requests by

Relevant information, requesting person other than client to refrain from giving, restrictions, 3.4

Rules of professional conduct**Violation**

Reporting, duties, 8.3

Sale of law practice

Restrictions, 1.17

Solicitation

Advertisements, see ADVERTISEMENTS

In-person or telephone contact with prospective clients, prohibited, 7.3

Statements by

Candidates for elective office, qualifications or integrity, 8.2

Judicial officers, qualifications or integrity, 8.2

Prohibited statements**False statements**

Bar admission applicants, 8.1

Disciplinary actions, 8.1

To court, 3.3

Lawyer's services, 7.2, 7.4

Prejudicial statements to media, criminal trials, 3.5

Trials, 3.4

Suspended attorneys

Employment by other attorneys, 5.7

Third persons

Rights of, respect for, duties, 4.4

Tribunals

Candor toward, requirements, 3.3

Communication with officials

Restrictions and requirements, 3.5

Unauthorized practice of law

Prohibited, 5.5

BANKS**Agreements by**

Overdraft notification

Lawyer trust accounts, 1.15

Fees

Lawyer trust accounts, 1.15

CLIENT-LAWYER RELATIONSHIP**Advice**

Offering, 2.1

Scope, 2.1

CLIENT-LAWYER RELATIONSHIP (Cont'd)

- Children
 - Duties, generally, 1.14
- Clients with disabilities
 - Duties, generally, 1.14
- Confidentiality
 - Law firms, lawyers working in, 1.10
 - Requirements, 1.6
- Corporations
 - Dual representation
 - Entity and officers, 1.13
 - Generally, 1.13
- Financial assistance to clients
 - Restrictions, generally, 1.8
- Former clients
 - Representation of interests adverse to, restrictions, 1.9
- Intermediary
 - Lawyer acting as, 2.2
- Loans to clients
 - Restrictions, 1.8
- Relatives who are lawyers
 - Representation of clients with adverse interest, restrictions, 1.8
- Representation
 - Communication with client
 - Duties, 1.4
 - Fees, 1.5
 - Competence, requirement, 1.1
 - Criminal conduct by client
 - Knowing assistance, prohibited, 1.2
 - Diligence, requirement, 1.3
 - Objectives
 - Client's decisions
 - Criminal cases, duties of lawyer, 1.2
 - Generally, 1.2
 - Settlement offers, 1.2
 - Limitations, 1.2
 - Scope, 1.2
 - Termination
 - Grounds, 1.16
 - Withdrawal
 - Grounds, 1.16
- Sexual relations
 - Consensual sexual relations
 - Restrictions, 1.8
 - Defined, 1.8

CONFLICT OF INTEREST

- Attorneys
 - Legal services organizations, 6.3
 - Prohibited transactions
 - Exceptions, 1.8
 - Former clients, 1.9
 - Generally, 1.7
 - Sale of law practice, 1.17

CORPORATIONS

- Attorneys for
 - Duties, generally, 1.13

COURTS

- Candor
 - Requirements, 3.3
- Rules
 - Knowing disobedience, prohibited, 3.4

CREDIT UNIONS

- Agreements by
 - Overdraft notification
 - Lawyer trust accounts, 1.15

Fees

- Lawyer trust accounts, 1.15

CRIMINAL CASES

- Attorney fees
 - Contingency fees
 - Prohibited, 1.5

DEFINITIONS

- Belief, TERMINOLOGY
- Believes, TERMINOLOGY
- Consult, TERMINOLOGY

DEFINITIONS (Cont'd)

- Consultation, TERMINOLOGY
- Financial institution
 - Lawyer trust accounts, 1.15
- Firm, TERMINOLOGY
- Fraud, TERMINOLOGY
- Fraudulent, TERMINOLOGY
- Knowingly, TERMINOLOGY
- Known, TERMINOLOGY
- Knows, TERMINOLOGY
- Law firm
 - Generally, TERMINOLOGY
 - Disqualification, 1.10
- Lawyer
 - Sale of law practice, 1.17
- Legal evaluation
 - Evaluation for use by third persons, 2.3
- Matter
 - Successive government and private employment, 1.11
- Notice of dishonor
 - Lawyer trust accounts, 1.15
- Partner, TERMINOLOGY
- Properly payable
 - Lawyer trust accounts, 1.15
- Reasonable, TERMINOLOGY
- Reasonable belief, TERMINOLOGY
- Reasonably, TERMINOLOGY
- Reasonably believes, TERMINOLOGY
- Reasonably should know, TERMINOLOGY
- Sexual relations
 - Conflicts of interest, 1.8
- Substantial, TERMINOLOGY
- Tribunal, TERMINOLOGY

DISCOVERY

- Compliance
 - Diligent efforts, requirements, 3.4
- Frivolous requests
 - Prohibited, 3.4

DISSOLUTION OF MARRIAGE

- Attorney fees
 - Contingency fees
 - Prohibited, 1.5

EVIDENCE

- Access to
 - Obstruction, prohibited, 3.4
- False evidence
 - Knowingly offering to court, prohibited, 3.3
 - Refusal to offer, duties, 3.3
- Falsification of
 - Participation in, prohibited, 3.4

EX PARTE PROCEEDINGS

- Candor toward court
 - Requirements, generally, 3.3

FINANCIAL INSTITUTIONS

- Agreements by
 - Overdraft notification
 - Lawyer trust accounts, 1.15

INTERPRETATION OF RULES

- Misleading legal arguments
 - Dishonesty toward tribunal, interpreted as, 3.3

JUDGES

- Former judges
 - Disqualification, requirements, 1.12

JURIES

- Jurors
 - Communication with
 - After trial, restrictions, 3.5
 - During trial, prohibited, 3.5
 - Family members
 - Communication with
 - Application of rules, 3.5
 - Improper conduct by or toward
 - Revealing to court, duties, 3.5
 - Investigation of
 - Restrictions, 3.5

JURIES (Cont'd)

- Prospective jurors
 - Communication with
 - Prior to trial, prohibited, 3.5
- Family members
 - Communication with
 - Application of rules, 3.5
- Improper conduct by or toward
 - Revealing to court, duties, 3.5
- Investigation of
 - Restrictions, 3.5

JURISDICTION

- Attorney misconduct
 - Generally, 8.5

LAW CLERKS

- Former law clerks
 - Disqualification, requirements, 1.12

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

- Rulemaking
 - Approval and termination of financial institutions
 - Lawyer trust accounts, 1.15

LAWYERS PROFESSIONAL RESPONSIBILITY OFFICE

- Agreements by
 - Overdraft notification
 - Financial institutions, lawyer trust accounts, 1.15
- Approvals by
 - Financial institutions
 - Lawyer trust accounts, 1.15
- Filing with
 - Overdraft notification report forms
 - Financial institutions, lawyer trust accounts, 1.15
- Reports received
 - Attorney misconduct, 8.3

LEGAL SERVICES ORGANIZATIONS

- Attorneys
 - Conflict of interest, 6.3
- Directors
 - Attorneys serving as, 6.3
- Officers
 - Attorneys serving as, 6.3

LEGISLATURE

- Appearance before
 - Attorneys, duties, 3.9

LOANS

- Attorneys
 - Loans to clients, restrictions, 1.8

MALPRACTICE

- Attorney malpractice
 - Agreements limiting, prohibited, 1.8
 - Claims, liability, 1.8

PARTIES TO SUITS

- Attorneys
 - Communication with other parties, restrictions, 4.2
- Opposing parties
 - Fairness, attorneys, duties, 3.4
- Pro se parties
 - Attorneys, duties when dealing with, 4.3

PROSECUTORS

- Criminal proceedings
 - Responsibilities, 3.8

SAVINGS AND LOAN ASSOCIATIONS

- Agreements by
 - Overdraft notification
 - Lawyer trust accounts, 1.15
- Fees
 - Lawyer trust accounts, 1.15

SAVINGS BANKS

- Agreements by
 - Overdraft notification
 - Lawyer trust accounts, 1.15
- Fees
 - Lawyer trust accounts, 1.15

SETTLEMENT

- Agreements
 - Attorneys representing two or more clients, 1.8
- Offers
 - Client's decisions regarding settlement offers, 1.2

SEX

- Sexual relations
 - Lawyers and clients, 1.8

STATE AGENCIES

- Appearance before
 - Attorneys, duties, 3.9

TRIALS

- Advocacy
 - Duties, 3.1
- Candor toward court
 - Requirements, 3.3
- Criminal trials
 - Publicity
 - Prejudicial extrajudicial statements
 - Prohibited, 3.6
- Statements during
 - Criminal trials
 - Prejudicial statements, prohibited, 3.5
 - Prohibited statements, 3.4

WITNESSES

- Attorneys as
 - Restrictions, generally, 3.7

Rules on Lawyers Professional Responsibility

Adopted November 1, 1976 Effective January 1, 1977

With amendments received through August 1, 2000

TABLE OF HEADNOTES

Rule

1. Definitions
2. Purpose
3. District Ethics Committee
 - (a) Composition
 - (b) Duties
4. Lawyers Professional Responsibility Board
 - (a) Composition
 - (b) Compensation
 - (c) Duties
 - (d) Executive Committee
 - (e) Panels
 - (f) Assignment to Panels
 - (g) Approval of petitions
5. Director
 - (a) Appointment
 - (b) Duties
 - (c) Employees
 - (d) Client Security Board Services
6. Complaints
 - (a) Investigation
 - (b) Notification; referral
 - (c) Copies of investigator's report
 - (d) Opportunity to respond to statements
- 6Z. Complaints Involving Judges
 - (a) Jurisdiction
 - (b) Procedure for conduct occurring prior to assumption of judicial office
7. District Committee Investigation
 - (a) Assignment; assistance
 - (b) Report
 - (c) Time
 - (d) Removal
 - (e) Notice to complainant
8. Director's Investigation
 - (a) Initiating investigation
 - (b) Complaints by criminal defendants
 - (c) Investigatory subpoena
 - (d) Disposition
 - (e) Review by Lawyers Board
9. Panel Proceedings
 - (a) Charges; setting pre-hearing meeting
 - (b) Answer to charges
 - (c) Request for admission
 - (d) Deposition
 - (e) Pre-hearing meeting
 - (f) Setting Panel hearing
 - (g) Referee probable cause hearing
 - (h) Form of evidence at Panel hearing
 - (i) Procedure at Panel hearing

- (j) Disposition
- (k) Notification
- (l) Complainant's petition for review
- (m) Respondent's appeal to Supreme Court
- (n) Manner of recording
- (o) Panel chair authority
- 10. Dispensing with Panel Proceedings
 - (a) Agreement of parties
 - (b) Admission or tender of conditional admission
 - (c) Criminal conviction
 - (d) Other serious matters
 - (e) Additional charges
 - (f) Discontinuing Panel proceedings
- 11. Resignation
- 12. Petition for Disciplinary Action
 - (a) Petition
 - (b) Service
 - (c) Respondent not found
- 13. Answer to Petition for Disciplinary Action
 - (a) Filing
 - (b) Failure to file
- 14. Hearing on Petition for Disciplinary Action
 - (a) Referee
 - (b) Conduct of hearing before referee
 - (c) Subpoenas
 - (d) Record
 - (e) Referee's findings, conclusions, and recommendations
 - (f) Panel as referee
 - (g) Hearing before Court
- 15. Disposition; Protection of Clients
 - (a) Disposition
 - (b) Protection of clients
- 16. Temporary Suspension Pending Disciplinary Proceedings
 - (a) Petition for temporary suspension
 - (b) Service
 - (c) Answer
 - (d) Hearing; disposition
 - (e) Interim suspension
- 17. Felony Conviction
 - (a) Duty of the court administrator
 - (b) Other cases
- 18. Reinstatement
 - (a) Petition for reinstatement
 - (b) Investigation; report
 - (c) Recommendation
 - (d) Hearing before Court
 - (e) General requirements for reinstatement
 - (f) Reinstatement by affidavit
- 19. Effect of Previous Proceedings
 - (a) Criminal conviction
 - (b) Disciplinary proceedings
 - (c) Stipulation
 - (d) Panel proceedings
 - (e) Admission
- 20. Confidentiality; Expunction
 - (a) General rule
 - (b) Special matters
 - (c) Records after determination of probable cause

- or commencement of referee or court proceedings
- (d) Referee or Court proceedings
- (e) Expunction of records
- 21. Privilege; Immunity
 - (a) Privilege
 - (b) Immunity
- 22. Payment of Expenses
- 23. Supplemental Rules
- 24. Costs and Disbursements
 - (a) Costs
 - (b) Disbursements
 - (c) Time and manner for taxation of costs and disbursements
 - (d) Judgment for costs and disbursements
- 25. Required Cooperation
 - (a) Lawyer's duty
 - (b) Grounds of discipline
- 26. Duties of Disciplined or Resigned Lawyer
 - (a) Notice to clients in nonlitigation matters
 - (b) Notice to parties and tribunal in litigation
 - (c) Manner of notice
 - (d) Client papers and property
 - (e) Proof of compliance
 - (f) Maintenance of records
 - (g) Condition of reinstatement
- 27. Trustee Proceeding
 - (a) Appointment of trustee
 - (b) Protection of records
- 28. Disability Status
 - (a) Transfer to disability inactive status
 - (b) Immediate transfer
 - (c) Asserting disability in disciplinary proceeding
 - (d) Reinstatement
 - (e) Transfer following hearing
- 29. Ex Parte Communications
- 30. Administrative Suspension

INDEX

TEXT OF RULES

Rule 1. Definitions

As used in these Rules:

- (1) "Board" means the Lawyers Professional Responsibility Board.
- (2) "Chair" means the Chair of the Board.
- (3) "Executive Committee" means the committee appointed by the Chair under Rule 4(d).
- (4) "Director" means the Director of the Office of Lawyers Professional Responsibility.
- (5) "District Bar Association" includes the Range Bar Association.
- (6) "District Chair" means the Chair of a District Bar Association's Ethics Committee.
- (7) "District Committee" means a District Bar Association's Ethics Committee.
- (8) "Notify" means to give personal notice or to mail to the person at the person's last known address or the address maintained on this Court's attorney registration records, or to the person's attorney if the person is represented by counsel.

(9) "Panel" means a panel of the Board.

(Amended July 1, 1986; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991.)

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.

(Amended July 22, 1982; amended July 1, 1986.)

Rule 3. District Ethics Committee

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

(1) A Chair 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 Chair; 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 consecutive three-year terms, nor more than a total of four three-year terms, in addition to any additional shorter term for which the person was originally appointed and any period served as District Chair. 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 Chair 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 Executive Committee may require.

(Amended July 1, 1986; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991.)

Rule 4. Lawyers Professional Responsibility Board

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

(1) A Chair 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 Chair; and

(2) 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 the person was originally appointed and any period served as Chair. 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 Chair, 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, and may, from time to time, issue opinions on questions of professional conduct. The Board shall prepare and submit to this Court an annual report covering the operation of the lawyer discipline and disability system. The Board may elect a Vice-Chair and specify the Vice-Chair's duties. Board meetings are open to the public, except the Board may go into closed session not open to the public to discuss matters protected by Rule 20 or for other good cause.

(d) Executive Committee. The Executive Committee, consisting of the Chair, and two lawyers and two nonlawyers designated annually by the Chair, 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.

(e) Panels. The Chair 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 Chair and a Vice-Chair for each Panel. 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 Chair or the Vice-Chair may designate substitute Panel members from current or former Board members or current or former District Committee members for the particular matter, provided, that any panel with other than current Board members must include at least one current lawyer Board member. A Panel may refer any matters before it to the full Board, excluding members of the Executive Committee.

(f) Assignment to Panels. The Director shall assign matters to Panels in rotation. The Executive Committee may, however, redistribute case assignments to balance workloads among the Panels, appoint substitute panel members to utilize Board member or District Committee member expertise, and assign appeals of multiple admonitions issued to the same lawyer to the same Panel for hearing.

(g) 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.

(Amended and effective May 11, 1978; amended July 22, 1982; amended July 1, 1986; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991; amended to govern all lawyer disciplinary actions commenced on or after January 1, 1995.)

Rule 5. Director

(a) Appointment. The Director shall be appointed by and serve at the pleasure of this Court, and shall be paid such salary as this Court shall fix. The Board shall review the performance of the Director every two years or at such times as this Court directs and the Board shall make recommendations to this Court concerning the continuing service of the Director.

(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 the Board an annual report covering the operation of the Office of Lawyers Professional Responsibility and shall make such other reports to the Board as the Board or this Court through the Board may order.

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

(d) **Client Security Board Services.** Subject to the approval of this Court, the Client Security Board and the Lawyers Board, the Director may provide staff investigative and other services to the Client Security Board. Compensation for such services may be paid by the Client Security Board to the Director's office upon such terms as are approved by the Lawyers Board and the Client Security Board. The Lawyers Board and the Client Security Board may also establish further terms for the provision by the Director of such services.

(Amended July 22, 1982; amended July 1, 1986; amended May 21, 1987, effective July 1, 1987; amended January 1, 1989.)

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 investigator shall investigate a matter in which disqualification would be required of a judge under Canon 3 of the Code of Judicial Conduct. No employee of the office of Lawyers Professional Responsibility shall be assigned to a matter if the employee's activities outside the Office are such that a judge with similar activities would be disqualified 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 Chair promptly shall notify the Director of its pendency. If a complaint is submitted to the Director, it shall be referred for investigation to the District Committee of the district where the lawyer's principal office is located or in exceptional circumstances to such other District Committee as the Director reasonably selects, unless the Director 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.

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

(Amended July 1, 1986; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991; amended to govern all lawyer disciplinary actions commenced on or after January 1, 1995.)

Rule 6X. (Repealed August 1, 1999.)

6Y. (Repealed August 1, 1999.)

Rule 6Z. Complaints Involving Judges

(a) **Jurisdiction.** The Lawyers Professional Responsibility Board has jurisdiction to consider whether discipline as a lawyer is warranted in matters involving conduct of any judge occurring prior to the assumption of judicial office and conduct of a part-time judge, including referees of conciliation court, not occurring in a judicial capacity. The Board on Judicial Standards may also exercise jurisdiction to consider whether judicial discipline is warranted in such matters.

(b) Procedure for Conduct Occurring Prior to Assumption of Judicial Office.

(1) **Complaint; Notice.** If either the executive secretary or the Office of Lawyers Professional Responsibility makes an inquiry or investigation, or receives a complaint, concerning the conduct of a judge occurring prior to assumption of judicial office, it shall so notify the other. Notice is not required if all proceedings relating to

the inquiry, investigation or complaint have been resolved before the judge assumes judicial office.

(2) Investigation. Complaints of a judge's unprofessional conduct occurring prior to the judge assuming judicial office shall be investigated by the Office of Lawyers Professional Responsibility and processed pursuant to the Rules on Lawyers Professional Responsibility. The Board on Judicial Standards may suspend a related inquiry pending the outcome of the investigation and/or proceedings.

(3) Authority of Board on Judicial Standards to Proceed Directly to Public Charges. If probable cause has been determined under Rule 9(j)(ii) of the Rules on Lawyers Professional Responsibility or proceedings before a referee or the Supreme Court have been commenced under those rules, the Board on Judicial Standards may, after finding sufficient cause under Rule 6 of the Rules of the Board on Judicial Standards, proceed directly to the issuance of a formal complaint under Rule 8 of those rules.

(4) Record of Lawyer Discipline Admissible in Judicial Disciplinary Proceeding. If there is a hearing under Rule 9 or Rule 14 of the Rules on Lawyers Professional Responsibility, the record of the hearing, including the transcript, and the findings and conclusions of the panel, referee, and/or the Court shall be admissible in any hearing convened pursuant to Rule 10 of the Rules of the Board on Judicial Standards. Counsel for the judge and the Board on Judicial Standards may be permitted to introduce additional evidence, relevant to violations of the Code of Judicial Conduct, at the hearing under Rule 10.

(Added effective March 30, 1999.)

Advisory Committee Comment - 1999 Amendment

Rule 6Z outlines the process for handling complaints concerning conduct by a judge before assuming judicial office. Rule 6Z(a) grants the Lawyers Professional Responsibility Board jurisdiction to consider whether such conduct warrants lawyer discipline, while the Board on Judicial Standards retains jurisdiction to consider whether the same conduct warrants judicial discipline. R.Bd.Jud.Std. 2.

The procedural provisions of Rule 6Z(b)(1)-(4) are identical to those in R.Bd.Jud.Stds. 6Z(a)-(d). The committee felt that repetition of the significant procedural provisions was more convenient and appropriate than a cross-reference.

Rule 6Z(b)(1) is identical to R.Bd.Jud.Std. 6Z(a) and requires the staff of the Lawyers Professional Responsibility Board and the Judicial Standards Board to notify each other about complaints concerning conduct by a judge occurring before the judge assumed judicial office. Notice is not required if all proceedings relating to the inquiry, investigation or complaint have been resolved before the judge assumed judicial office.

Rule 6Z(b)(1) neither increases nor decreases the authority of the executive secretary or Office of Lawyers Professional Responsibility to investigate or act on any matter. That authority is governed by other rules. Rule 6Z(b)(1) merely establishes a mutual duty to provide notice about complaints or inquiries concerning conduct of a judge occurring before the judge assumed judicial office.

Although a fair number of complaints received by the executive secretary and the Office of Professional Responsibility are frivolous, there have been relatively few complaints concerning conduct occurring prior to a judge assuming judicial office. Thus, the committee believes that this procedure will not result in a needless duplication of efforts.

Under Rule 6Z(b)(2) and its counterpart R.Bd.Jud.Std. 6Z(b), it is contemplated that complaints about the conduct of a judge occurring prior to the judge assuming judicial office will be investigated in the first instance by the Office of Lawyers Professional Responsibility, and the results would be disclosed to the Board on Judicial Standards. R.Bd.Jud.Std. 5(a)(4); R.L.Prof.Resp. 20(a)(10). This allows for efficient and effective use of investigative resources by both disciplinary boards.

Rule 6Z(b)(3) is identical to R.Bd.Jud.Std. 6Z(c) and authorizes the Board on Judicial Standards to proceed directly to issuance of a formal complaint under R.Bd.Jud. Std. 8 when there has been a related public proceeding under the Rules on Lawyers Professional Responsibility involving conduct of a judge that occurred prior to the judge assuming judicial office. In these circumstances the procedure under R.Bd.Jud.Std. 7 may only serve to delay the judicial disciplinary process.

Rule 6Z(b)(3) does not prohibit the Board on Judicial Standards from proceeding to public disciplinary proceedings in cases in which only private discipline (e.g., an admonition) has been imposed under the Rules on Lawyers Professional Responsibility for conduct of a judge occurring prior to the judge assuming judicial office. In these cases, the Board on Judicial Standards would be required to follow R.Bd.Jud.Std. 7 (unless, of course, the matter is resolved earlier, for example, by dismissal or public reprimand).

Rule 6Z(b)(4) is identical to R.Bd.Jud.Std. 6Z(d) and authorizes the use of the hearing record and the findings and recommendations of the lawyer disciplinary process in the judicial disciplinary process. This is intended to streamline the judicial disciplinary hearing when there has already been a formal fact finding hearing in the lawyer disciplinary process, and permits the Supreme Court to rule on both disciplinary matters as quickly as possible.

Under Rule 6Z(b)(4) it is contemplated that the hearing record and the findings and conclusions of the lawyer disciplinary process will be the first evidence introduced in the judicial disciplinary hearing. Counsel for the Board on Judicial Standards and the judge may be permitted to introduce additional evidence relevant to alleged Code of Judicial Conduct violations at the judicial disciplinary hearing. Counsel must be aware that there may be situations in which the introduction of additional evidence will not be permitted. See, e.g., *In re Gillard*, 260 N.W.2d 562, 564 (Minn. 1977) (after review of hearing record and findings and conclusions from lawyer disciplinary process, Supreme Court ruled that findings would not be subject to collateral attack in the related judicial disciplinary proceeding and that additional evidence may be introduced only as a result of a stipulation or order of the fact finder); *In re Gillard*, 271 N.W.2d 785, 809 (Minn. 1978) (upholding removal and disbarment where Board on Judicial Standards as fact finder refused to consider additional testimony but allowed filing of deposition and exhibits and made alternative findings based on those filings). Although the Rules of the Board on Judicial Standards do not expressly provide for a pre-hearing conference, it is contemplated that admissibility issues will be resolved by the presider of the fact finding panel sufficiently in advance of the hearing to allow the parties adequate time to prepare for the hearing.

Rule 7. District Committee Investigation

(a) **Assignment; assistance.** The District Chair 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 investigator's report and recommendations shall be submitted for review and approval to the District Chair, the Chair's designee or to a committee designated for this purpose by the District Chair, 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 90 days after the District Committee received the complaint, unless good cause exists. If the report is not made within 90 days, the District Chair or the

Chair's 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 90-day limitation, the Director shall advise the Board and the Chair 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 Chair of the removal.

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

(Amended July 1, 1986; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991; amended effective for lawyer discipline matters pending or commenced after August 1, 1999.)

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 the Director 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) Complaints by criminal defendants. No investigation shall commence on a complaint by or on behalf of a party represented by court appointed counsel, insofar as the complaint against the court appointed attorney alleges incompetent representation by the attorney in the pending matter. Any such complaint shall be summarily dismissed without prejudice. The Director's dismissal shall inform the complainant that the complaint may be sent to the chief district judge or trial court judge involved in the pending matter. The judge may, at any time, refer the matter to the Director for investigation. The Director may communicate with the appropriate court regarding the complaint and its disposition.

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

(d) Disposition.

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

- (i) Set forth a brief explanation of the Director's conclusion;
- (ii) Set forth the complainant's identity and the complaint's substance;

and

- (iii) Inform the complainant of the right to appeal under subdivision (e).

(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 nonserious nature, the Director may issue an admonition. The Director shall issue an admonition if so directed by a Board member reviewing a complainant appeal, under the circumstances identified in Rule 8(e). The Director shall notify the lawyer in writing:

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

(iii) That the lawyer may, by notifying the Director in writing within 14 days, demand that the Director so present the charges to a Panel which shall consider the matter de novo or instruct the Director to file a Petition for Disciplinary Action in this Court; and

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

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 the complainant of the right to appeal under subdivision (e).

(3) Stipulated probation.

(i) In any matter, with or without a complaint, if the Director concludes that a lawyer's conduct was unprofessional and that a private probation is appropriate, and the Board Chair or Vice-Chair approves, the Director and the lawyer may agree that the lawyer will be subject to private probation for a specified period up to two years, provided the lawyer throughout the period complies with specified reasonable conditions. At any time during the period, with the Board Chair or Vice-Chair's approval, the 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 maintain a permanent disciplinary record of all stipulated probations.

(ii) The Director shall notify the complainant, if any, and the Chair 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 the complainant of the right to appeal under subdivision (e).

(iii) If it appears that the lawyer has violated the conditions of the probation, or engaged in further misconduct, the Director may either submit the matter to a Panel or upon a motion made with notice to the attorney and approved by a Panel Chair chosen in rotation, file a petition for disciplinary action under Rule 12. A lawyer may, in the stipulation for probation, waive the right to such consideration by the Panel or Panel Chair.

(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 (d) (2)(iii); or

(iii) A reviewing Board member so directs upon an appeal under subdivision (e).

(e) Review by Lawyers Board. If the complainant is not satisfied with the Director's disposition under Rule 8(d)(1), (2) or (3), the complainant may appeal the matter by notifying the Director in writing within 14 days. The Director shall notify the lawyer of the appeal and assign the matter by rotation to a Board member, other than an Executive committee member, appointed by the Chair. The reviewing Board member may:

(1) approve the Director's disposition; or

(2) direct that further investigation be undertaken; or

(3) if a district ethics committee recommended discipline, but the Director determined that discipline is not warranted, the Board member may instruct the Director to issue an admonition; or

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

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

(Amended July 22, 1982; amended July 1, 1986; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991; amended to govern all lawyer disciplinary actions commenced on or after January 1, 1995.)

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 pre-hearing meeting, and notify the lawyer of:

- (1) The charges;
- (2) The name, address, and telephone number of the Panel Chair and Vice-Chair;
- (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 Chair or Vice-Chair.

(b) Answer to charges. Not less than seven days before the pre-hearing meeting, the lawyer shall serve on the Director an answer to the charges. The answer may deny or admit any accusations or state any defense or privilege.

(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 Chair or Vice-Chair 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 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 prehearing meeting. If a party objects, the Panel may award expenses of proof as permitted by the Rules of Civil Procedure for the District Courts. No additional exhibit shall be received at the Panel hearing without the opposing party's consent or the Panel's permission; and
- (3) The parties shall prepare a prehearing statement.

(f) Setting Panel hearing. Promptly after the prehearing 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 Chair or Vice-Chair.

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, and of the prehearing 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 prehearing meeting, unless the parties agree otherwise or the Panel Chair or Vice-Chair orders to the contrary.

(g) Referee probable cause hearing. Upon the certification of the Panel Chair and the Board Chair 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.

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

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

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.

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

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

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

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

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

(5) The parties may present oral arguments;

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

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

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

(1) if the hearing was held on charges of unprofessional conduct:

(i) determine that there is not probable cause to believe that public discipline is warranted; or

(ii) if it finds probable cause to believe that public discipline is warranted, instruct the Director to file in this Court a petition for disciplinary action. The Panel shall not make a recommendation as to the matter's ultimate disposition; or

(iii) if it concludes that the attorney engaged in conduct that was unprofessional but of an isolated and nonserious nature, the Panel shall state the facts and conclusions constituting unprofessional conduct and issue an admonition.

(2) If the hearing was on a lawyer's appeal of an admonition issued under Rule 8(d)(2), the Panel shall affirm or reverse the admonition, or, if there is probable cause to believe that public discipline is warranted, instruct the Director to file a petition for disciplinary action in this Court.

(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. The notification to the complainant, if any, shall inform the complainant of the right to petition for review under subdivision (l). If the Panel affirmed the Director's admonition, the notification to the lawyer shall inform the lawyer of the right to appeal to the Supreme Court under subdivision (m).

(l) Complainant's petition for review. If not satisfied with the Panel's disposition, the Complainant may within 14 days file with the Clerk of the Appellate Courts a petition for review. The clerk shall notify the respondent and the Board Chair of the petition. The respondent shall be denominated by number or randomly selected initials in the proceeding. This Court will grant 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 a Panel's affirmation of the Director's admonition or an admonition issued by a Panel by filing a notice of appeal and seven copies thereof with the Clerk of Appellate Courts and by serving a copy on the Director within 30 days after being notified of the Panel's action. The respondent shall be denominated by number or randomly selected initials in the proceeding. This Court may review the matter on the record or order such further proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may either affirm the decision or make such other disposition as it deems appropriate.

(n) Manner of recording. The Director shall arrange for a court reporter to make a record of the proceedings as in civil cases.

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

(Amended July 22, 1982; amended October 22, 1984; amended July 1, 1986; amended April 27, 1987, effective July 1, 1987; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991; amended to govern all lawyer disciplinary actions commenced on or after January 1, 1995; amended effective June 13, 1996; amended effective June 24, 1996; amended effective for lawyer discipline matters pending or commenced after August 1, 1999.)

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.** If the lawyer admits some or all charges, 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. This Court may act thereon with or without any of the procedures under Rules 12, 13, or 14.

(c) **Criminal conviction or guilty plea.** If a lawyer pleads guilty to or is convicted of a felony under Minnesota statutes, 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 Chair 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 nonfiling of personal income tax returns, flagrant noncooperation including failure to attend a prehearing 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.

(e) **Additional charges.** If a petition under Rule 12 is pending before this Court, the Director must present the matter to the Panel Chair, or if the matter was not heard by a Panel, 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.

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

(Amended July 22, 1982; amended July 1, 1986; amended April 27, 1987, effective July 1, 1987; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991.)

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, the Director shall promptly advise the Court. If the Director objects, the Director 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.

(Amended October 16, 1981; amended January 1, 1989.)

Rule 12. Petition for Disciplinary Action

(a) **Petition.** When so directed by a Panel or by this Court or when authorized under Rule 10 or this Rule, the Director shall file with this Court a petition for disciplinary action. An original and seven copies shall be filed. The petition shall set forth the unprofessional conduct charges. When a lawyer is subject to a probation ordered by this Court and the Director concludes that the lawyer has breached the conditions of the probation or committed additional serious misconduct, the Director may file with this Court a petition for revocation of probation and further disciplinary action.

(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.

(d) Reciprocal discipline. Upon learning from any source that a lawyer licensed to practice in Minnesota has been publicly disciplined or is subject to public disciplinary charges in another jurisdiction, the Director may commence an investigation and, without further proceedings, may file a petition for disciplinary action with this Court. A lawyer subject to such charges or discipline shall notify the Director. If the lawyer has been publicly disciplined in another jurisdiction, this Court may issue an order directing that the lawyer and the Director inform the Court within 30 days whether either or both believe the imposition of the identical discipline by this Court would be unwarranted and the reasons for that claim. Without further proceedings this Court may thereafter impose the identical discipline unless it appears that discipline procedures in the other jurisdiction were unfair, or the imposition of the same discipline would be unjust or substantially different from discipline warranted in Minnesota. If this Court determines that imposition of the identical discipline is not appropriate, it may order such other discipline or such other proceedings as it deems appropriate. Unless the Court determines otherwise, a final adjudication in another jurisdiction that a lawyer had committed certain misconduct shall establish conclusively the misconduct for purposes of disciplinary proceedings in Minnesota.

(Amended July 22, 1982; amended February 21, 1984; amended July 1, 1986; amended February 11, 1991, effective March 1, 1991.)

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 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) 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.

(Amended February 21, 1984; amended July 1, 1986; amended January 1, 1989.)

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.

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

(e) **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 ten days, orders a transcript and so notifies this Court, the findings of fact and conclusions shall be conclusive. If either the respondent or the Director so orders a transcript, then none of the findings of fact or conclusions shall be conclusive, and either party may challenge any findings of fact or conclusions. One ordering a transcript within ten days of the date the transcript is ordered shall file with the clerk of appellate courts a certificate as to transcript signed by the court reporter. The certificate shall contain the date on which the transcript was ordered, the estimated completion date (which shall not exceed 30 days from the date the transcript was ordered), and a statement that satisfactory financial arrangements have been made for the transcription. One ordering a transcript shall order and pay for an original transcript for the Court plus two copies, one copy for the respondent and one for the Director. One ordering a transcript shall specify in the initial brief to the Court the referee's findings of fact, conclusions and recommendations that are disputed.

(f) **Panel as referee.** Upon written agreement of an attorney, the Panel Chair 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).

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

(Amended October 22, 1984; amended July 1, 1986; amended April 27, 1987, effective July 1, 1987; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991; amended effective for lawyer discipline matters pending or commenced after August 1, 1999.)

Rule 15. Disposition; Protection of Clients

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

- (1) Disbar the lawyer;
- (2) Suspend the lawyer indefinitely or for a stated period of time;
- (3) Order the lawyer to pay costs;
- (4) Place the lawyer 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 the lawyer;
- (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;
- (8) Require the lawyer to pay costs and disbursements; in addition, in those contested cases where the lawyer has acted in the proceedings in bad faith, vexatiously, or for oppressive reasons, order the lawyer to pay reasonable attorney fees; or
- (9) 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.

(c) **Petition for rehearing.** A petition for rehearing may be filed regarding an order of the Court under this rule, by following the procedures of Rule 140, Rules of Civil Appellate Procedure. The filing of a petition for rehearing shall not stay this Court's order.

(Amended October 16, 1981; amended July 22, 1982; amended September 1, 1982; amended April 26, 1983; amended April 27, 1987, effective July 1, 1987; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991.)

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 a lawyer's authority to practice law pending final determination of the disciplinary proceeding poses a substantial threat of serious harm to the public, the Director may file with this Court an original and seven copies of a petition for suspension of the lawyer pending final determination of the disciplinary proceeding. The petition shall set forth facts as may constitute grounds for the suspension and may be supported by a transcript of evidence taken by a Panel, court records, documents or affidavits.

(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 in this Court an original and seven copies of an answer to the petition for temporary suspension. If the lawyer 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 poses a substantial threat of serious harm 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 orders otherwise.

(Amended July 22, 1982; amended February 21, 1984; amended April 27, 1987, effective July 1, 1987; amended January 1, 1989; amended to govern all lawyer disciplinary actions commenced on or after January 1, 1995.)

Rule 17. Felony Conviction

(a) **Duty of the court administrator.** Whenever a lawyer is convicted of a felony, the court administrator 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. (Amended July 22, 1982; amended July 1, 1986.)

Rule 18. Reinstatement

(a) **Petition for reinstatement.** A petition for reinstatement to practice law shall be served upon the Director and the President of the State Bar Association. The original petition, with proof of service, and seven copies, shall then be filed with this Court. Together with the petition served upon the Director's Office, a petitioner seeking reinstatement shall pay to the Director a fee of \$300.

(b) **Investigation; report.** The Director shall investigate and report the Director's conclusions to a Panel.

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

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

(e) **General requirements for reinstatement.**

(1) Unless such examination is specifically waived by this Court, no lawyer ordered reinstated to the practice of law after having been disbarred by this Court shall be effectively reinstated until the lawyer shall have successfully completed such written examinations as may be required of applicants for admission to the practice of law by the State Board of Law Examiners.

(2) No lawyer ordered reinstated to the practice of law after having been suspended or transferred to disability inactive status by this Court, and after petitioning for reinstatement under subdivision (a), shall be effectively reinstated until the lawyer shall have successfully completed such written examination as may be required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility.

(3) Unless specifically waived by this Court, any lawyer suspended for a fixed period of 90 days or less, and any suspended lawyer for whom the Court waives the requirements of subdivisions (a) through (d), must, within one year from the date of the suspension order, successfully complete such written examination as may be required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility. Except upon motion and for good cause shown, failure to successfully complete this examination shall result in automatic suspension of the lawyer effective one year after the date of the original suspension order.

(4) Unless specifically waived by this Court, no lawyer shall be reinstated to the practice of law following the lawyer's suspension, disbarment, or transfer to disability inactive status by this Court until the lawyer shall have satisfied (1) the requirements imposed under the rules for Continuing Legal Education on members of the bar as a condition to a change from a restricted to an active status; and (2) any subrogation claim against the lawyer by the Client Security Board.

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

affidavit, the Director shall promptly file a proposed order and an affidavit regarding the lawyer's compliance or lack thereof with the requirements for reinstatement. The lawyer may not resume the practice of law unless and until this Court issues a reinstatement order.

(Amended October 16, 1981; amended February 21, 1984; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991; amended effective for lawyer discipline matters pending or commenced after August 1, 1999.)

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 the lawyer committed the conduct for which the lawyer 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 and investigated where discipline was not warranted. Conduct considered in previous lawyer disciplinary proceedings of any jurisdiction is inadmissible if it was determined in the proceedings that discipline was not warranted, except to show a pattern of related conduct the cumulative effect of which constitutes an ethical violation, except as provided in subsection (b)(2).

(2) Conduct previously considered where no investigation was taken and discipline was not warranted. Conduct in previous lawyer disciplinary proceedings of any jurisdiction which was not investigated is admissible, even if it was determined in the proceedings without investigation that discipline was not warranted.

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

(4) Previous discipline. The fact that the lawyer received discipline in previous disciplinary proceedings is admissible to determine the nature of the discipline to be imposed, but is not admissible to prove that a violation occurred and is not admissible to prove the character of the lawyer in order to show that the lawyer acted in conformity therewith; provided, however, that evidence of such prior discipline may be used to prove:

(i) A pattern of related conduct, the cumulative effect of which constitutes a violation;

(ii) The current charge (e.g., the lawyer has continued to practice despite suspension);

(iii) For purposes of impeachment (e.g., the lawyer denies having been disciplined before); or

(iv) Motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(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 proceedings under these Rules.

(Amended January 12, 1981; amended July 22, 1982; amended July 1, 1986; amended January 1, 1989; amended effective for lawyer discipline matters pending or commenced after August 1, 1999.)

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) After probable cause has been determined under Rule 9(j)(ii) or proceedings before a referee or this Court have been commenced under these Rules;

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

(4) Upon request of the lawyer affected, the file maintained by the Director shall be produced including any district committee report; however, the Director's work product shall not be required to be produced, nor shall the Director or Director's staff be subject to deposition or compelled testimony, except upon a showing to the Court issuing the subpoena of extraordinary circumstance and compelling need. In any event, the mental impressions, conclusions, opinions and legal theories of the Director and Director's staff shall remain protected;

(5) If the complainant is, or at the time of the actions complained of was, the lawyer's client, the lawyer shall furnish to the complainant copies of the lawyer's written responses to investigation requests by the Director and District Ethics Committee, except that insofar as a response does not relate to the client's complaint or involves information as to which another client has a privilege that portions may be deleted;

(6) Where permitted by this Court; or

(7) Where required or permitted by these Rules;

(8) Nothing in this rule shall be construed to require the disclosure of the mental processes or communications of the Committee or Board members made in furtherance of their duties; or

(9) As between the Director and the Client Security Board in furtherance of their duties to investigate and consider claims of client loss allegedly caused by the intentional dishonesty of a lawyer; or

(10) As between the Director and the Board on Judicial Standards or its executive secretary in furtherance of their duties to investigate and consider conduct of a judge that occurred prior to the judge assuming judicial office.

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

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

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

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

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

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

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

Notwithstanding any other provision of this rule, the records of matters in which it has been determined that discipline is not warranted shall not be disclosed to any

person, office or agency except to the lawyer and as between Committees, Board, Director, Referee or this Court in furtherance of their duties under these Rules.

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

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

(e) 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 three years after the dismissal;

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

(Amended April 26, 1983; amended July 1, 1986; amended April 27, 1987 and May 21, 1987, effective July 1, 1987; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991; amended to govern all lawyer disciplinary actions commenced on or after January 1, 1995; amended effective March 30, 1999.)

Advisory Committee Comment - 1999 Amendment

Rule 20 has been modified to permit the exchange of information between the two disciplinary boards and their staff in situations involving conduct of a judge that occurred prior to the judge assuming judicial office. See also R.L.Prof.Resp. 20(a)(10). Both the Board on Judicial Standards and the Lawyers Professional Responsibility Board have jurisdiction in such cases. R.Bd.Jud.Std. 2(b); R.L.Prof.Resp. 6Z.

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 the Director's staff, and those entering into agreements with the Director's Office to supervise probations, shall be immune from suit for any conduct in the course of their official duties.

(Amended May 29, 1980; amended July 22, 1982; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991.)

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 the Director 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.

(Amended January 1, 1989.)

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 \$900.

(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 court.

(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.

(Added May 29, 1980; amended April 27, 1987, effective July 1, 1987; amended effective June 13, 1996.)

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 the Director's staff, the Board, or a Panel, by complying with reasonable requests, including requests to:

- (1) Furnish 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 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; 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.

(Added October 16, 1981; amended July 1, 1986; amended January 1, 1989.)

Rule 26. Duties of Disciplined, Disabled, or Resigned Lawyer

(a) **Notice to clients in nonlitigation matters.** Unless this Court orders otherwise, a disbarred, suspended or resigned lawyer, or a lawyer transferred to disability inactive status, shall notify each client being represented in a pending matter other than litigation or administrative proceedings of the lawyer's disbarment, suspension, resignation, or disability. The notification shall urge the client to seek legal advice of the client's own choice elsewhere, and shall include a copy of the Court's order.

(b) **Notice to parties and tribunal in litigation.** Unless this Court orders otherwise, a disbarred, suspended, resigned lawyer, or a lawyer transferred to disability inactive status, shall notify each client, opposing counsel (or opposing party acting pro se) and the tribunal involved in pending litigation or administrative proceedings of the lawyer's disbarment, suspension, resignation, or disability. The notification to the client shall urge the prompt substitution of other counsel in place of the disbarred, suspended, resigned, or disabled lawyer, and shall include a copy of the Court's order.

(c) **Manner of notice.** Notices required by this Rule shall be sent by certified mail, return receipt requested, within ten days of the Court's order.

(d) **Client papers and property.** A disbarred, suspended, resigned, or disabled 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 15 days after the effective date of the Court's order, the disbarred, suspended, resigned, or disabled 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, resigned, or disabled lawyer shall be attached to the affidavit, along with proof of mailing by certified mail.

(f) **Maintenance of records.** A disbarred, suspended, resigned, or disabled 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, resigned, or disabled lawyer, proof of compliance with this Rule and with the disbarment, suspension, resignation, or disability order will be available.

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

(Added October 16, 1981; amended January 1, 1989; amended February 11, 1991, effective March 1, 1991.)

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, resigned, or disabled lawyer has not complied with Rule 26, and that no arrangement has been made for another lawyer to discharge such responsibilities, this Court 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.

(Added October 16, 1981; amended February 11, 1991, effective March 1, 1991.)

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 the lawyer from competently representing clients shall be transferred to disability inactive status.

(b) **Immediate transfer.** This Court may immediately transfer a lawyer to disability inactive status upon proof that the lawyer has been found in a judicial proceeding to be a mentally ill, mentally deficient, incapacitated, or inebriate person.

(c) **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. If a lawyer alleges disability during a disciplinary investigation or proceeding and therefore is unable to assist in the defense, the Director shall inform the Court of the allegation and of the Director's position regarding the allegation. The Court may:

- (1) Transfer the lawyer to disability inactive status;
- (2) Order the lawyer to submit to a medical examination by a designated professional;
- (3) Appoint counsel if the lawyer has not retained counsel;
- (4) Stay disciplinary proceedings until it appears the lawyer can assist in the defense;
- (5) Direct the Director to file a petition under Rule 12;
- (6) Appoint a referee with directions to make findings and recommendations to the Court regarding the disability allegation or to proceed under Rule 14;
- (7) Make such or further orders as the Court deems appropriate.

(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 the transfer to disability inactive status.

(e) **Transfer following hearing.** In cases other than immediate transfer to disability inactive status, and other than cases in which the lawyer asserts personal disability, 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 may be appointed to represent the lawyer; 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.

(Added July 22, 1982; amended January 1, 1989.)

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.

(Added July 1, 1986.)

Rule 30. Administrative Suspension

(a) Upon receipt of a district court order or a report from an Administrative Law Judge or public authority pursuant to Minnesota Statutes, section 518.551, subdivision 12, finding that a licensed Minnesota attorney is in arrears in payment of maintenance or child support and has not entered into or is not in compliance with an approved payment agreement for such support, the Director's Office shall serve and file with the Supreme Court a motion requesting the administrative suspension of the attorney until such time as the attorney has paid the arrearages or entered into or is in compliance with an approved payment plan. The Court shall suspend the lawyer or take such action as it deems appropriate.

(b) Any attorney administratively suspended under this rule shall not practice law or hold himself or herself out as authorized to practice law until reinstated pursuant to paragraph (c). The attorney shall, within 10 days of receipt of an order of administrative suspension, send written notice of the suspension to all clients, adverse counsel and courts before whom matters are pending and shall file an affidavit of compliance with this provision with the Director's Office.

(c) An attorney administratively suspended under this rule may be reinstated by filing an affidavit with supporting documentation averring that he or she is no longer in arrears in payment of maintenance or child support or that he or she has entered into and is in compliance with an approved payment agreement for payment of such support. Within 15 days of the filing of such an affidavit the Director's Office shall verify the accuracy of the attorney's affidavit and file a proposed order for reinstatement of the attorney requesting an expedited disposition.

(d) Nothing in this rule precludes disciplinary proceedings, if the attorney's conduct also violates the Minnesota Rules of Professional Conduct.

(Added effective June 13, 1996; amended effective June 24, 1996.)

INDEX - LAWYERS PROFESSIONAL RESPONSIBILITY

ALCOHOLISM

Attorneys
Disability status, transfer to, Rule 28

ANSWERS

Disciplinary action petitions
Requirements, Rule 13
Suspension from practice of law
Temporary suspension petitions, Rule 16

ATTORNEYS

Admissions
Allegations, disciplinary petitions
Failure to file response, effect, Rule 13
Admissions by
Unprofessional conduct
Admissible evidence, disciplinary proceedings, Rule 19
Affidavits
Compliance with orders
Disbarment, suspension, resignation, or disability, Rule 26

Alcoholism
Disability status, transfer to, Rule 28

Answers
Unprofessional conduct
Effect, panel proceedings, Rule 9; Rule 10

Appeals by
Disposition of proceedings, Rule 9

Attendance
Pre-hearing meetings
Panel proceedings, Rule 9

Conviction
Felonies, see Felonies under this topic
Foreign jurisdictions, effect on disciplinary proceedings, Rule 19

Disciplinary actions
Administrative suspension, effect, Rule 30
Admission of unprofessional conduct
Effect on, Rule 19

Cooperation
Requirements, Rule 25
Criminal convictions, foreign jurisdictions
Effect on, Rule 19

Criminal convictions, grounds, Rule 17
Defenses, Rule 28

Disability
Assertion during proceeding, effect, Rule 28
Disciplinary hearings, disposition, Rule 15

Failure to cooperate
Violation of rules, Rule 25

Grounds, generally, Rule 17
Judgments for costs and disbursements, payment, requirements, Rule 24

Prior proceedings
Effect on, Rule 19
Reciprocal actions, Rule 12

Drug abuse
Disability status, transfer to, Rule 28

Felonies
Conviction
Judgment of, certified copies
Court administrators, duties, Rule 17
Panel proceedings
Dispensing with, grounds, Rule 10

Interpretation of rules
Allegations, disciplinary petitions
Failure to file response, deemed admission, Rule 13

Notice given
Disbarment, suspension, resignation, or disability
Duties, generally, Rule 26, Rule 30

Notice received
Disposition of panel proceedings, Rule 9

Payments by
Judgments for costs and disbursements
Disciplinary proceedings, Rule 24

Petitions by
Reinstatement to practice law, Rule 18

ATTORNEYS (Cont'd)

Petitions by (Cont'd)
Resignation from bar
Procedure, Rule 11
Records
Compliance with orders
Disbarment, suspension, resignation, or disability, Rule 26

Reinstatement
After administrative suspension, Rule 20
After disability, Rule 28
Compliance with orders, proof, requirements, Rule 26
Reinstatement by affidavit
Procedure, Rule 18
Requirements, generally, Rule 18

Reports received
Unprofessional conduct, investigations, Rule 6

Requests by
Investigators' reports
Unprofessional conduct investigations, Rule 6

Resignation from bar
Duties, generally, Rule 26
Procedure, Rule 11

Service of process on
Petitions

Disciplinary actions, Rule 12
Temporary suspension, disciplinary actions, Rule 16
Suspension from practice of law

Administrative suspension
Disciplinary actions, effect on, Rule 30
Duties during suspension, Rule 30
Grounds, Rule 30

Duties, generally, Rule 26
Grounds, Rule 12

Temporary suspension pending disciplinary proceedings
Procedure, Rule 16

Trustees for, see TRUSTEES

Unprofessional conduct, complaints about
Investigations

Complainants
Response to lawyer's response, rights, Rule 6
Failure to cooperate
Violation of rules, Rule 25
Generally, Rule 6

BRIEFS

Disciplinary hearings
Cover, color requirements, Rule 14

CHILD SUPPORT

Orders
Attorneys, noncompliance
Suspension from practice of law, grounds, Rule 30

CLIENT SECURITY BOARD

Services to
Generally, Rule 5

COSTS AND DISBURSEMENTS (COURTS)

Supreme court
Disciplinary proceedings
Generally, Rule 24

COURT ADMINISTRATORS

Felony convictions, attorneys
Judgments, certified copies, duties, Rule 17

COURT REPORTERS

Disciplinary actions
Duties, generally, Rule 14

DEFINITIONS

District bar association, Rule 1
District chair, Rule 1
District committee, Rule 1
Notify, Rule 1
Panel, Rule 1

DEPOSITIONS

- Panel proceedings
 - Taking, procedure, Rule 9

DISTRICT BAR ASSOCIATIONS

- District committee
 - Defined, Rule 1
- District ethics committees
 - Composition, Rule 3
- Investigations by
 - Alleged unprofessional conduct
 - Generally, Rule 3
 - Time limits, Rule 7
 - Methods, Rule 7
- Members
 - Immunity, Rule 21
- Notice received
 - Disposition of panel proceedings, Rule 9
- Records
 - Confidentiality, requirements, Rule 20
 - Disclosure, restrictions, Rule 20
- Reports given
 - Committee composition, compliance, Rule 3
 - Investigations, Rule 3
 - Investigators' reports
 - Copies, Rule 6
 - Recommendations, Rule 7
- Rulemaking
 - Supplemental rules, Rule 23

DRUG ABUSE

- Attorneys
 - Disability status, transfer to, Rule 28

EVIDENCE

- Disciplinary proceedings
 - Attorneys, admissions by, unprofessional conduct, Rule 19
- Panel proceedings
 - Form of evidence, requirements, Rule 9

INTERPRETATION OF RULES

- Attorneys
 - Failure to cooperate
 - Grounds, disciplinary actions, Rule 25
- Disciplinary petitions
 - Allegations in
 - Failure to file response, deemed admission, Rule 13

JUDGES

- Complaints involving judges
 - Conduct occurring prior to assumption of judicial office, procedure, Rule 6Z

JUDGMENTS

- Costs and disbursements (courts), see **COSTS AND DISBURSEMENTS (COURTS)**

JUDICIAL STANDARDS BOARD

- Authority
 - Complaints involving judges, Rule 6Z
- Jurisdiction
 - Complaints involving judges, Rule 6Z

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

- Approvals by
 - Client security board
 - Services to, Rule 5
- Chair
 - Duties, Rule 4
 - Term limits, Rule 4
- Director
 - Appointment, Rule 5
 - Attendance
 - Pre-hearing meetings
 - Panel proceedings, Rule 9
 - Communications with
 - Privilege, Rule 21
 - Complaints
 - Removal from district committee, Rule 7
 - Disciplinary actions, duties, Rule 12
 - Disclosure
 - Records
 - Confidentiality, requirements, Rule 20

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD (Cont'd)

- Director (Cont'd)
 - Disclosure (Cont'd)
 - Special matters, Rule 20
 - Duties, generally, Rule 5
 - Employees, hiring, Rule 5
 - Expenses, payment by Supreme Court, Rule 22
 - Hearings, duties, Rule 9
 - Immunity, Rule 21
 - Investigations
 - Complaints by criminal defendants
 - Summary dismissal, requirements, Rule 8
 - Disposition, Rule 8
 - Initiation, Rule 8
 - Reinstatement petitions, Rule 18
 - Motions
 - Administrative suspension from practice of law, Rule 30
 - Notice given
 - Disposition of proceedings, Rule 9
 - Progress of proceedings
 - Investigations, Rule 7
 - Panel proceedings, duties, Rule 9
 - Records
 - Confidentiality, requirements, Rule 20
 - Reports given
 - Investigations, reinstatement petitions, Rule 18
 - Salary and compensation, Rule 5
 - Service of process by
 - Disciplinary actions, Rule 12
 - Subpoenas
 - Issuance, Rule 8
- Duties
 - Generally, Rule 4
- Executive committee
 - Duties, Rule 4
 - Membership, requirements, Rule 4
- Fees
 - Reinstatement petitions, Rule 18
- Hearings
 - Disciplinary actions
 - Disposition
 - Generally, Rule 15
 - Procedure, generally, Rule 14
 - Referees, duties, Rule 14
 - Panel hearings
 - Chair
 - Duties and authority, Rule 9
 - Disposition, Rule 9
 - Evidence
 - Form, requirements, Rule 9
 - Procedures, Rule 9
 - Recording, requirements, Rule 9
 - Waivers, Rule 10
 - Probable cause hearings, Rule 9
 - Referees
 - Appointment, Rule 9
 - Time and place of, setting, Rule 9
- Investigations
 - Complaints involving judges, Rule 6Z
- Jurisdiction
 - Complaints involving judges, Rule 6Z
- Members
 - Expenses, payment by Supreme Court, Rule 22
 - Geographical representation, requirements, Rule 4
 - Immunity, Rule 21
 - Salaries and compensation, Rule 4
 - Term limits, Rule 4
- Panels
 - Approvals by
 - Petitions for disciplinary action, Rule 4
 - Defined, Rule 1
 - Ex parte communications with, Rule 29
 - Hearings
 - Chair
 - Authority, Rule 9
 - Disciplinary hearings
 - Procedure, Rule 14
 - Pre-hearing meetings, Rule 9

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
(Cont'd)

Panels (Cont'd)

Members

Immunity, Rule 21

Membership, requirements, Rule 4

Proceedings

Discontinuance

Director, duties, Rule 10

Evidence, admissibility, Rule 19

Recommendations by

Reinstatement petitions, Rule 18

Records

Disciplinary hearings

Records admissible in proceeding against attorney after
assumption of judicial office, Rule 6Z

Disclosure, restrictions, Rule 20

Expunction, Rule 20

Reports received

District bar associations, ethics committees

Committee composition, compliance, Rule 3

Investigations, Rule 3

Review by

Director's investigations

Disposition, Rule 8

Rulemaking

Supplemental rules, Rule 23

MOTIONS

Administrative suspension from practice of law, Rule 30

PARTIES TO SUITS

Complainants

Appeals by

Disposition of proceedings, Rule 9

Notice received

Disposition of proceedings, Rule 9

Response to lawyer's response, rights, Rule 6

Costs and disbursements, see COSTS AND

DISBURSEMENTS (COURTS)

Respondents

Notice received

Disposition of proceedings, Rule 9

Response to complaint, rights, Rule 6

PRIVILEGES AND IMMUNITY

Complaints, charges, or statements relating to complaints

Generally, Rule 21

RAMSEY COUNTY DISTRICT COURT

Subpoenas

Issuance

Disciplinary actions, Rule 14

REFEREES (COURT)

Appointment

Disciplinary action hearings, Rule 14

Probable cause hearings, Rule 9

Ex parte communications with

Disciplinary actions, Rule 29

Findings, conclusion, and recommendations

Disciplinary action hearings, Rule 14

REQUESTS FOR ADMISSION OF DOCUMENTS OR THINGS

Panel proceedings

Procedure, Rule 9

RULES OF CIVIL PROCEDURE

Application of rules

Disciplinary hearings, Rule 14

Panel proceedings, Rule 9

RULES OF PROFESSIONAL RESPONSIBILITY

Purpose, Rule 2

RULES OF PROFESSIONAL RESPONSIBILITY (Cont'd)

Violation

Failure to cooperate, investigations, deemed to be violation,
Rule 25**SPOUSAL MAINTENANCE**

Orders

Attorneys, noncompliance

Suspension from practice of law, grounds, Rule 30

STIPULATION

Disciplinary actions

Prior actions, effect, Rule 19

SUBPOENAS

Issuance

Disciplinary action hearings, Rule 14

Investigatory subpoenas

Director's investigations, Rule 8

SUPREME COURT

Appeals to

Disciplinary actions

Disposition orders, Rule 15

Panel proceedings

Disposition, Rule 9

Appointments by

Lawyers professional responsibility board

Chair, Rule 4

Director, Rule 5

Members, Rule 4

Referees

Disciplinary hearings, Rule 14

Trustees

Trustee proceedings, Rule 27

Approvals by

Client security board

Services to, Rule 5

Costs and disbursements (courts), see COSTS AND

DISBURSEMENTS (COURTS)

Ex parte communications with

Disciplinary actions, Rule 29

Hearings

Disciplinary hearings, Rule 14

Reinstatement petitions, Rule 18

Temporary suspension pending disciplinary proceedings,
Rule 16

Orders

Disciplinary actions

Clients, protection after discipline of lawyer, Rule 15

Disposition orders, Rule 15

Suspension from practice of law, Rule 16

Temporary suspension, Rule 16

Reciprocal discipline, Rule 12

Show cause orders

Disciplinary actions, Rule 12

Suspension from practice of law, Rule 12, Rule 15, Rule 16

Transfer to disability inactive status following hearing, Rule
28

Payments by

Expenses

Director and board members, Rule 22

Petitions to

Attorneys

Resignation from bar

Procedure, Rule 11

Suspension pending final determination, Rule 16

TRUSTEES

Appointment

Grounds for, Rule 27

WAIVERS

Panel proceedings

Grounds, Rule 10

Lawyers Professional Responsibility Board Opinions

TABLE OF HEADNOTES

Opinion

- 1 The Legal Force and Effect of Opinions Issued by the State Board of Professional Responsibility
- 2 Defense of Criminal Cases by a County Attorney
- 3 Practice of Law by Part-Time Judge
- 4 Payment of Fees
- 5 Arbitration of Fee Dispute
- 6 Defense of Criminal Cases by Municipal Attorneys
- 8 Attorneys' Guidelines for Law Office Services by Nonlawyers
- 9 Maintenance of Books and Records
- 10 Debt Collection Procedures
- 11 Attorneys' Liens
- 12 Trust Account Signatories
- 13 Copying Costs of Client Files, Papers and Property
- 14 Attorney Liens on Client Homesteads
- 15 Advance Fee Payments and Availability or Nonrefundable Retainers
- 16 Interest and Late Charges on Attorneys Fees
- 17 Accepting Gratuities from Court Reporting Services and Other Similar Services
- 18 Secret Recordings of Conversations
- 19 Using Technology to Communicate Confidential Information to Clients

TEXT OF OPINIONS

OPINION NO. 1

The Legal Force and Effect of Opinions Issued by The State Board of Professional Responsibility

It is the policy of the State Board of Professional Responsibility to issue, from time to time, advisory opinions as to the professional conduct of lawyers, whether as a result of a specific request or its own initiative, on matters deemed important by the Board.

The Board considers these opinions to be guidelines for the conduct of lawyers in the State of Minnesota. Failure to comply with the standards set forth in these opinions may subject the lawyer to discipline. See, e.g., In Re Pearson, 352 N.W.2d 415 (Minn. 1984).

Opinions issued by the Board will be subject to change from time to time as deemed necessary by the Board, or as required by decisions of the Minnesota Supreme Court.

Adopted: October 27, 1972.

Amended: December 4, 1987.

OPINION NO. 2

Defense of Criminal Cases by a County Attorney

It is improper for a county attorney of one county to accept the defense of a criminal case in another county of the state. Nevertheless, this rule would be out-

weighed in any case where the accused would be deprived of competent counsel or put to an unreasonable burden of expense by the application of this rule. In this event, the county attorney to be retained, as soon as practicable after he is asked to represent the accused, shall petition a judge of the court before which the matter is to be tried for permission to represent the accused. Upon a proper showing of good cause, the judge may issue an order approving defense of the case by the petitioner. If the court decides that the facts of the situation do not justify granting this exception, the attorney involved shall then withdraw from the case. In any event, defense counsel who is also a county attorney shall scrupulously refrain from any reference to his position as a county attorney in the course of all proceedings.

Adopted: October 27, 1972.

OPINION NO. 3

It is improper for a part-time judge, or his partners or associates, to practice law in the court on which the part-time judge serves, or in any court of record subject to the appellate jurisdiction of the court on which the part-time judge serves.

Adopted: November 20, 1972.

OPINION NO. 4

It is professional misconduct for a lawyer, having accepted a fee to represent a client, to refuse to proceed with the client's matter until any remaining fee is paid in full unless the client has failed to honor an agreement or obligation to the lawyer as to expenses or fees. If the attorney raises the client's failure to honor a fee agreement as a defense for his failure to proceed, the agreement must be established by clear and convincing evidence or be in writing, signed by the attorney and the client.

It is professional misconduct for a lawyer to withdraw from representation in a proceeding before any tribunal without first giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and obtaining permission to withdraw from the tribunal where required. See Rule 1.16, Minnesota Rules of Professional Conduct, concerning a lawyer's obligations upon the termination of representation.

Adopted: October 12, 1973.

Amended: December 4, 1987.

OPINION NO. 5

It is professional misconduct for an attorney who has signed an agreement to arbitrate a fee dispute to refuse to honor and carry out the final decision reached in such proceedings. See *In Re Pearson*, 552 N.W.2d 415 (Minn. 1984).

Adopted: April 19, 1974.

Amended: December 4, 1987.

OPINION NO. 6

Defense of Criminal Cases by Municipal Attorneys

It is improper for a city or municipal attorney to accept the defense of a criminal case arising within the limits of the city or municipality which he serves. It is not improper for a city or municipal attorney to accept the defense of criminal cases in

other areas provided he is not required to challenge the validity of a state statute which he would otherwise be required to support while acting in his capacity as a prosecutor, and provided there is no other actual conflict of interest. If such a challenge or conflict arises, he should withdraw from the case.

In any event, defense counsel who is also a city or municipal attorney shall scrupulously refrain from any reference to his position as a city or municipal attorney in the course of all proceedings.

Adopted: June 26, 1974.

OPINION NO. 8

Attorneys' Guidelines for Law Office Services by Nonlawyers

Except to the extent permitted by the Supreme Court of the State of Minnesota, (e.g., Student Practice Rules) neither law students nor any other person not duly admitted to the practice of law shall be named on pleadings under any identification.

Legal assistants, or other paralegal employees, may be listed on professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, so long as the paralegals are clearly identified as such, and so long as no false, fraudulent, misleading, or deceptive statements or claims are made concerning said paralegals, their legal status and authority, or their relationships to the firms by which they are employed. Paralegals may use business cards so identifying themselves, which cards carry the law firm's name and address.

Such a paralegal, so identified, may sign correspondence on behalf of the law firm, provided he or she does so by direction of an attorney-employer.

Nonlawyers must be supervised by an attorney who is responsible for their work. If the attorney-supervisor permits violations of these guidelines, he shall be guilty of professional misconduct. See also Rule 5.3 and Comment, Minnesota Rules of Professional Conduct.

Adopted: June 26, 1974.
Amended: June 18, 1980 and
December 4, 1987.

OPINION NO. 9

Maintenance of Books and Records

Every attorney engaged in the private practice of law must maintain the books and records described in this Opinion to comply with the applicable provisions of the Minnesota Rules of Professional Conduct (MRPC) relating to funds and property received and disbursed on behalf of clients or otherwise held in a fiduciary capacity. Equivalent books and records demonstrating the same information in an easily accessible manner and in substantially the same detail are acceptable. Books and records may be prepared manually or by computer.

I. Trust Account Records. The following books and records must be maintained for funds and property received and disbursed in a fiduciary capacity, whether for clients or for others:

1. An identification of all trust accounts maintained, including the name of the bank or other depository, account number, account name, date account opened, and an agreement with bank establishing each account and its interest bearing nature. A record should also be maintained showing clearly the type of each such account whether pooled, with net interest paid to the Lawyers Trust Account Board (IOLTA

account), pooled with allocation of interest, or individual, including the client name. See Rules 1.15(e), (f)(1), and (f)(2), MRPC.

2. A check register for each trust account that chronologically shows all deposits and checks.

a. Each deposit entry must include the date of the deposit, the amount, the identity of the client(s) for whom the funds were deposited, and the purpose of the deposit.

b. Each check entry must include the date the check was issued, the payee, the amount, the identity of the client for whom the check was issued (if not the payee), and the purpose of the check.

3. Subsidiary ledgers for each client matter for whom the attorney receives trust funds.

a. For every trust account transaction, attorneys must record on the appropriate client subsidiary ledger the date of receipt or disbursement, the amount, the payee and check number (for disbursements), the purpose of the transaction, and the balance of funds remaining in the account on behalf of that client matter. An attorney shall not disburse funds from the trust account that would create a negative balance on behalf of an individual client matter.

b. A separate subsidiary ledger for nominal funds of the attorney held in the trust account pursuant to Rule 1.15(a)(1), MRPC, to accommodate reasonably expected bank fees and charges. This ledger should also record any monthly service charges not offset or waived by the bank in the same month. A separate ledger should be maintained to record interest accrued but not transferred by the bank to the Lawyers Trust Account Board in the same month it is credited.

c. An attorney maintaining non-IOLTA accounts pursuant to Rule 1.15(f), MRPC, shall record on each client subsidiary ledger the monthly accrual of interest, and the date and amount of each interest disbursement, including disbursements from accrued interest for costs of establishing and administering the account.

4. A monthly trial balance of the subsidiary ledgers identifying each client matter, the balance of funds held on behalf of the client matter at the end of each month, and the total of all the client balances. No balance for a client matter may be negative at any time.

5. A monthly reconciliation of the checkbook balance, the subsidiary ledger trial balance total, and the adjusted bank statement balance. The adjusted bank statement balance is determined from the month-end bank statement balance by adding outstanding deposits and subtracting outstanding checks.

Sample trial balances and reconciliations are available from the Office of Lawyers Professional Responsibility.

6. Bank statements, canceled checks, and duplicate deposit slips. Cash fee payments must be documented by copies of receipts countersigned by the payor. All disbursements must be by check, except when payment by check would be economically imprudent or when exigent circumstances require a transaction by wire transfer. For withdrawal by wire transfer, an attorney or law firm must create a written memorandum authorizing the transaction, signed by the attorney responsible for the transaction. The wire transfer must be entered in the check register and include all the identifying information listed in paragraphs I(2)(b) and I(3)(a) of this Opinion.

7. **Electronic Record Retention.** An attorney who maintains trust account records by computer must print and retain, on a monthly basis, the checkbook register, the trial balance of the subsidiary ledgers, and the reconciliation report. The checkbook register must contain all of the information identified in paragraph 2. Electronic records should be regularly backed up by an appropriate storage device. The frequency of the back up procedure should be directly related to the volume of activity in the trust account.

8. A record showing all property, specifically identified, other than cash, held in trust from time to time for clients or others, provided that routine files, documents and

items such as real estate abstracts which are not expected to be held indefinitely need not be so recorded but should be documented in the files of the lawyer as to receipt and delivery.

II. Business Account Records. An attorney or law firm must maintain at least one bank account, other than the trust account, for funds and property received and disbursed outside the attorney's fiduciary capacity. The following books and records should be maintained for such accounts:

1. A record in the form of a fees book or file of copies of billing invoices reflecting all fees charged and other billing to clients.
2. Copies of receipts, countersigned by the payor, for all cash fee payments.
3. Check registers, bank statements, canceled checks, and duplicate deposit slips sufficient to establish the receipt of earned fee payments from clients, costs advanced on behalf of clients, and similar receipts and disbursements.
4. A periodic reconciliation of the checkbook balance and the bank statement balance.

Adopted: September 10, 1976.
 Amended: June 22, 1977,
 June 23, 1983,
 December 4, 1987,
 September 15, 1989,
 September 18, 1998 and
 August 1, 1999.

1998 Committee Comments

In the 9 years since the Lawyers Professional Responsibility Board last revised this Opinion, there have been significant changes in the ways attorneys may maintain their trust account books and records, most notably the rise of the personal computer and bookkeeping software as essential office equipment. Moreover, the Director's Office has reviewed hundreds of lawyers' trust accounts since 1990 through the administration of the overdraft notification program. This experience has given the Director insight into the most common record-keeping pitfalls and confirmed the types of records that lawyers must maintain to satisfy their ethical obligations to protect client funds.

The revised Opinion eliminates the requirement of separate cash receipts and disbursements journals, in favor of a more detailed chronological check register that records all trust account transactions, including the identity of the client and the purpose of the transaction. This simplifies manual record-keeping and comports with most software packages that allow input of all relevant information into one computer screen.

Routine monthly printing of hard copies of electronic records is required to allow reconstruction of trust account records in the event of a hardware failure. Attorneys should implement electronic backup procedures depending on the volume of activity in the trust account. For moderate to high volume trust accounts, weekly or even daily backups to floppy disks or mirrored network servers may be appropriate.

Wire transfers may be used for large denomination transactions provided that the lawyer or law firm creates the proper written authorization. The Board does not recommend that attorneys use wire transfers for transactions under \$10,000; checks signed by an attorney remain the primary means of properly disbursing funds from a trust account.

OPINION NO. 10

DEBT COLLECTION PROCEDURES

In order to prevent the possibility of misleading the public regarding its dealings with attorneys, it is imperative that the activities of attorneys be separate from - and be

perceived by the public to be separate from - the activities of debt collection agencies. The blurring of the distinction between the actions of a lawyer seeking to collect on a claim for a client and the actions of a debt collection agency seeking to collect on account for a creditor may lead to abuses of debtors and adversely reflect upon the legal profession.

To prevent the possibility of (a) misleading the public, or (b) abusing debtors, violations of the following guidelines by attorneys in connection with debt collection work may constitute grounds for discipline:

1. If an attorney is engaged both in the practice of law and in the debt collection agency business:

(a) The attorney shall not identify himself/herself as a lawyer in, or on, any building office sign, building tenants' directory, office sign or door sign of the debt collection agency.

(b) The attorney shall not have, or use, the same telephone number as that used by a debt collection agency.

(c) The attorney may perform legal services for the debt collection agency but in doing so shall use separate letterhead and shall not utilize the debt collection agency letterhead.

(d) All advertising or solicitation for business by the debt collection agency which identifies the attorney as a lawyer shall be subject to Rules 7.1 through 7.5, Minnesota Rules of Professional Conduct (MRPC).

2. If an attorney represents or performs legal work for a debt collection agency:

(a) The attorney shall not have, or use, the same telephone number as that used by a debt collection agency.

(b) The attorney shall not use the same office address as that used by a debt collection agency.

(c) The attorney shall not use the same letterhead as that used by the collection agency.

3. If an attorney is employed by a debt collection agency as in-house counsel:

(a) The attorney may use the same telephone number used by the debt collection agency.

(b) The attorney may use the same office address used by the debt collection agency.

(c) The attorney may use the same letterhead used by the debt collection agency, provided however, that all communications on agency letterhead which includes the attorney's name and/or title of in-house counsel, general counsel, or counsel for the debt collection agency shall be subject to the requirements set forth in paragraphs 4 through 9 of this opinion.

4. An attorney who represents, or performs legal work for, a debt collection agency shall exercise reasonable care to insure that confidences and secrets of the attorneys' clients are not disclosed by employees of the debt collection agency to any person not authorized by the client to receive such information. Rule 1.6(c), MRPC.

5. An attorney who represents, or performs legal work for, a debt collection agency shall be responsible for all acts of the attorney's own lay employees, and the attorney may not permit, expressly, by implication or by nonaction, lay employees to engage in conduct which, if engaged in by an attorney, would be in violation of the Rules of Professional Conduct. Rule 8.4(a), Rule 5.3, and Rule 5.5(b), MRPC.

6. Form letters, pleadings, or other legal documents shall be signed by an attorney who represents or performs legal work for a debt collection agency in the completed form in which they are to be sent, served or delivered.

7. Except for purposes of effecting service of legal process according to law, no attorney shall permit any correspondence, pleadings, garnishment summonses, executions, releases, or other documents which bear his or her signature (or a facsimile

thereof) to be used, or mailed, by persons who are not in the exclusive employ of the attorney's law office.

8. An attorney who represents, or performs legal work for, a debt collection agency shall not deliver to, or otherwise make available to, lay persons who are not in the exclusive employ of the attorney's law office:

- (a) Rubber stamp signatures;
- (b) Reproduced signatures;
- (c) Mechanized signatures;
- (d) Other facsimile signatures of the attorney;
- (e) Lawyer's stationery; or

(f) In the case of in-house counsel, debt collection agency letterhead bearing the attorney's name and/or title;

for purposes of allowing use of the same on demand letters, original pleadings, or on any other documents used in debt collection. Rule 8.4(d); Rule 5.5(b), MRPC.

9. An attorney shall not aid, abet or assist any debt collection agency in the violation of the provisions of Minnesota Statutes, section 332.37, prescribing prohibited practices of debt collection agencies. Similarly, an attorney shall not aid, abet or assist a debt collection agency in the violation of any other state or federal laws, rules or regulations governing debt collection agency practices.

Adopted: June 22, 1977.

Amended: December 4, 1987.

OPINION NO. 11

Attorneys' Liens

It is professional misconduct for an attorney to assert a retaining lien on the files and papers of a client. This prohibition applies to all retaining liens, whether they be statutory, common law, contractual, or otherwise.

Adopted: October 26, 1979.

OPINION NO. 12

Trust Account Signatories

Every lawyer engaged in the private practice of law shall by appropriate direction provide that every check, draft, or other withdrawal instrument drawn against a law firm trust account, or other similar or separate account maintained by a lawyer or law firm for the deposit of client funds and property, shall be signed by at least one lawyer associated with the lawyer or law firm.

Every lawyer engaged in the private practice of law shall by appropriate direction provide that no withdrawal from a law firm trust account or other similar separate account maintained for the deposit of client funds and property shall be made except at the direction of at least one lawyer associated with the lawyer or law firm.

Adopted: May 6, 1983.

OPINION NO. 13

Copying Costs of Client Files, Papers and Property

Client files, papers and property, whether printed or electronically stored, shall include:

1. All papers and property provided by the client to the lawyer.
2. All pleadings, motions, discovery, memorandums, and other litigation materials which have been executed and served or filed regardless of whether the client has paid the lawyer for drafting and serving and/or filing the document(s).
3. All correspondence regardless of whether the client has paid the lawyer for drafting or sending the correspondence.
4. All items for which the lawyer has advanced costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses including depositions, expert opinions and statements, business records, witness statements, and other materials which may have evidentiary value.

Client files, papers and property, whether printed or electronically stored, shall not include:

1. Pleadings, discovery, motion papers, memoranda and correspondence which have been drafted, but not sent or served if the client has not paid for legal services in drafting or creating the documents.
2. In nonlitigation settings, client files, papers and property shall not include drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have legal effect, where the client has not paid the lawyer for the services in drafting the document(s).

A lawyer who has withdrawn from representation or has been discharged from representation, may charge a former client for the costs of copying or electronically retrieving the client's files, papers and property only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge. Such copying charges must be reasonable. Copying charges which substantially exceed the charges of a commercial copy service are normally unreasonable.

A lawyer may not condition the return of client files, papers and property on payment of copying costs. Nor may the lawyer condition return of client files, papers or property upon payment of the lawyer's fee. See Opinion No. 11 of the Lawyers Professional Responsibility Board.

A lawyer may withhold documents not constituting client files, papers and property until the outstanding fee is paid unless the client's interests will be substantially prejudiced without the documents. Such circumstances shall include, but not necessarily be limited to, expiration of a statute of limitations or some other litigation imposed deadline. A lawyer who withholds documents not constituting client files, papers or property for nonpayment of fees may not assert a claim against the client for the fees incurred in preparing or creating the withheld document(s).

Adopted: June 15, 1989.

OPINION NO. 14

Attorney Liens on Client Homesteads

It is professional misconduct for a lawyer to file an attorney lien against a client's homestead or the client's interest in the homestead without first obtaining a valid waiver of the client's homestead exemption. The homestead exemption waiver must be a written document separate and apart from the fee agreement.

Adopted: June 15, 1990.

OPINION NO. 15**Advance Fee Payments and Availability or
Nonrefundable Retainers****DEFINITIONS**

(1) Advance Fee Payments: Funds paid by a client or a prospective client to a lawyer for specific services to be undertaken. All fees paid at the beginning of the representation shall be presumed to be advance fee payments unless a written fee agreement signed by the client states otherwise.

(2) Availability or Nonrefundable Retainers: Funds paid by a client or a prospective client to secure a lawyer's general availability to, or representation of, that client over a specified period of time or for a specific legal matter.

(3) An Accounting: An itemized statement issued to a client which lists all trust fund withdrawals (e.g., fees, costs or expenses) for that client since the last statement and which states the balance of that client's funds remaining in the trust account after the withdrawals have been made.

OPINION

All advance fee payments must be deposited into an interest bearing trust account in accordance with Rules 1.15(a)(2) and (f), Minnesota Rules of Professional Conduct. A lawyer may withdraw fees from the trust account when earned provided the client is given: (1) written notice of the time, amount and the purpose of the withdrawal; and (2) an accounting of the client's funds in the trust account. See In re Lochow, 469 N.W.2d 91 (Minn. 1991).

Funds paid to a lawyer pursuant to an availability or nonrefundable retainer agreement are not required to be deposited into a trust account or held in trust. All availability or nonrefundable retainer agreements must be in writing and signed by the client. Lochow, 469 N.W.2d at 98. All availability or nonrefundable retainer agreements must include a final paragraph immediately above the client signature line which informs the client that: (1) the funds will not be held in a trust account; and (2) the client may not receive a refund of the fees if the client later chooses not to hire the lawyer or chooses to terminate the lawyer's services. All fees paid pursuant to an availability or nonrefundable retainer agreement shall be reasonable in amount. The factors to be considered in determining the reasonableness of a lawyer's fee include those set forth in Rule 1.5(a), Minnesota Rules of Professional Conduct.

Adopted: September 13, 1991.

Amended: August 1, 1999.

OPINION NO. 16**Interest and Late Charges on Attorneys Fees**

A lawyer's fee shall be reasonable. See Rule 1.5(a), Minnesota Rules of Professional Conduct. An illegal fee is unreasonable. In Minnesota, the assessment of interest or late charges on attorney's fees is unreasonable, and a violation of Rule 1.5(a), if: (1) the rate of interest is usurious; or (2) Minnesota law requires that the client agree in writing to the imposition of the interest charges, and there is no such written agreement; or (3) federal truth-in-lending disclosures for consumer credit sales are required and have not been made.

The Lawyers Professional Responsibility Board hereby issues this opinion which incorporates its interpretation and prosecutorial position concerning interest or late charges on attorney's fees. This opinion is not intended to bind or influence any trial court or other adjudicatory body in determining civil liability under truth-in-lending or usury laws.

1. An attorney who charges a client interest at an annual rate of six percent or less on outstanding attorney's fees, without obtaining advance written agreement from the

client, will not be subject to lawyer discipline for failure to comply with the truth-in-lending requirements or disclosures.

2. An attorney who charges a client interest at an annual rate of eight percent or less, pursuant to a written agreement with the client, will not be subject to lawyer discipline for failure to comply with truth-in-lending requirements or disclosures.

3. An attorney who charges a client interest at an annual rate of more than eight percent will be subject to lawyer discipline for failure to comply with any truth-in-lending requirements or disclosures.

Adopted: March 26, 1993.

OPINION NO. 17

Accepting Gratuities from Court Reporting Services and Other Similar Services

It is improper for a lawyer to accept, or to permit any nonlawyer employee to accept, a gratuity offered by a court reporting service or other service for which a client is expected to pay unless the client consents after consultation. However, a lawyer may accept nominal gifts, such as pens, coffee mugs, and other similar advertising-type gifts without consent of the client. See Rules 1.4, 1.5(a), 1.8(f)(1) and 5.3, Minnesota Rules of Professional Conduct (MRPC). See also definition of "consultation" in the MRPC terminology section.

Adopted: June 18, 1993.

OPINION NO. 18

Secret Recordings of Conversations

It is professional misconduct for a lawyer, in connection with the lawyer's professional activities, to record any conversation without the knowledge of all parties to the conversation, provided as follows:

1. This opinion does not prohibit a lawyer from recording a threat to engage in criminal conduct;
2. This opinion does not prohibit a lawyer engaged in the prosecution or defense of a criminal matter from recording a conversation without the knowledge of all parties to the conversation;
3. This opinion does not prohibit a government lawyer charged with civil law enforcement authority from making or directing others to make a recording of a conversation without the knowledge of all parties to the conversation;
4. This opinion does not prohibit a lawyer from giving legal advice about the legality of recording a conversation.

Adopted: September 20, 1996.

Committee Comment

It has been the position of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility for over a decade that surreptitious recording of conversations by a lawyer constitutes unprofessional conduct. This position is consistent with that announced by the ABA Committee on Ethics and Professional Responsibility in Formal Opinion 337 (August 10, 1974). It is also the position held by the majority of state ethics authorities who have addressed the issue. The ABA and other state ethics authorities recognize that although secret recording is not illegal (provided one of the parties to the

conversation consents to the recording), such conduct is inherently deceitful and violates the profession's standards prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4 (c), Rules of Professional Conduct and DR 1-102(A)(4), Code of Professional Responsibility. The committee agrees that in most instances secret recording violates these standards.

The exceptions provided for in this opinion recognize that in certain limited circumstances, the interests served by surreptitious recordings outweighs the interests protected by prohibiting such conduct through professional standards. For example, a lawyer who is the subject of a criminal threat ought not be subject to discipline for secretly recording the threat. The "in connection with the lawyer's professional activities" language is intended to limit application of the opinion to those situations where a lawyer is representing a client or is representing him or herself in a legal matter.

Another exception is secret recording in the criminal prosecution area where such conduct has become a recognized law enforcement tool provided it is done within constitutional requirements. See e.g., ABA Formal Opinion 337 at page 3. The committee determined, however, that such an exception should also be recognized for lawyers engaged in the defense of a criminal matter. See also, Arizona Opinion No. 90-02; Tennessee Ethics Opinion 86-F-14(a), July 18, 1986; and Kentucky Opinion E-279 (Jan. 1984). Creating an exception only for prosecutors could create an imbalance raising potential constitutional problems. See e.g., *Kirk v. State*, 526 So. 2d 223, 227 (La. 1988) (court found disparity between permitting prosecutors to secretly record and prohibiting defense lawyers was impermissible denial of equal protection).

The exception provided to government lawyers engaged in civil law enforcement similarly recognizes that to effectively protect the public, surreptitious recording is a necessary law enforcement tool. In certain areas such as consumer fraud, false advertising, deceptive trade practices and charitable solicitation, there may be few, if any, alternatives to surreptitious recording for effective enforcement. The exception also recognizes that during the investigative stage, a government lawyer may not be able to determine with certainty whether the violations are civil, criminal or both.

Finally, because surreptitious recording with the consent of one of the parties is not illegal, the committee determined that a lawyer should not be prohibited from advising a client about the legality or admissibility of such a recording. This exception is not intended, however, to permit non-lawyer employees or agents of the lawyer to record conversations in violation of this opinion. See Rule 5.3, Minnesota Rules of Professional Conduct.

OPINION NO. 19

Using Technology to Communicate Confidential Information to Clients

A lawyer may use technological means such as electronic mail (e-mail) and cordless and cellular telephones to communicate confidential client information without violating Rule 1.6, Minnesota Rules of Professional Conduct (MRPC). Such use is subject to the following conditions:

1. E-mail without encryption may be used to transmit and receive confidential client information;
2. Digital cordless and cellular telephones may be used by a lawyer to transmit and receive confidential client information when used within a digital service area;
3. Analog cordless and cellular telephones may be used by a lawyer to transmit and receive confidential client information only if the lawyer obtains client consent after consultation with the client about the confidentiality risks associated with inadvertent interception;
4. When the lawyer knows, or reasonably should know, that a client or other person is using an insecure means, such as an analog cordless or cellular telephone, to communicate with the lawyer about confidential client information, the lawyer shall

consult with the client about the confidentiality risks associated with inadvertent interception and obtain the client's consent.

Adopted: January 22, 1999.

Comment

A lawyer may not knowingly reveal a confidence or secret of a client. Rule 1.6(a)(1). A lawyer should exercise care to prevent unintended disclosure. See Comment to Rule 1.6. For example, the lawyer should avoid professional discussions in the company of persons to whom the attorney-client privilege does not extend. Id. Similarly, a lawyer should take reasonable steps to prevent interception or unintended disclosure of confidential communications. All communication carries with it some such risk, for example by eavesdropping, wiretapping, or theft of mail. The precautions to be taken by a lawyer depend on the circumstances, including the sensitivity of the information, the manner of communication, the apparent risks of interception or unintended disclosure, and the client's wishes.

The purpose of this opinion is to address concerns that certain devices or methods may not be used by lawyers to communicate client confidences or secrets because they do not guarantee security. The committee believes absolute security is not required, and that the use of new technology is subject to the same analysis as the use of more traditional methods of communication.

This opinion reflects the prevalent view of other states and technology experts, that communications by facsimile, e-mail, and digital cordless or cellular phones, like those by mail and conventional corded telephone, generally are considered secure; their interception involves intent, expertise, and violation of federal law. Some states have required client consent or encryption for the use of e-mail, but the majority of recent state ethics opinions sanction the use of e-mail without such requirements. The committee finds the reasoning of the latter opinions persuasive. Communications by analog cordless or cellular phones generally are considered insecure; they may be intercepted intentionally or inadvertently with unsophisticated and readily available equipment, such as other similar phones or scanners. This opinion presumes that the digital telephone is being used in a location where digital service is available. Some digital cell telephones are programmed to convert automatically to analog service when brought into a location where digital service is not available. When this is the case, the precautions for analog cellular telephones apply.

The opinion intentionally omits facsimile machines, which typically transmit data over conventional telephone lines. With facsimile machines, the concerns are less with interception than with unintended dissemination of the communication at its destination, where the communication may be received in a common area of the workplace or home and may be read by persons other than the intended recipient. The Director has received client complaints involving such situations and cautions lawyers to take reasonable precautions to prevent unintended dissemination. Similar concerns may be raised by voice-mail and answering machine messages.

Rules for Admission to the Bar

Effective August 18, 1998

TABLE OF HEADNOTES

1. Purpose
2. Definitions
3. State Board of Law Examiners
 - A. Composition
 - B. Authority
 - C. Board Meetings
4. General Requirements for Admission
 - A. Eligibility for Admission
 - B. Residency
 - C. Application for Admission
 - (1) Complete Application
 - (2) Certificate of Graduation
 - (3) Additional Filing when Admitted Elsewhere
 - (4) Professional Responsibility Test Scores
 - (5) Repeat Examinee
 - (6) Incomplete Application
 - (7) Withdrawal of Application
 - (8) Strict Enforcement of Time Requirements
 - D. Required Cooperation
5. Standards for Admission
 - A. Essential Eligibility Requirements
 - B. Character and Fitness Standards and Investigation
 - (1) Purpose
 - (2) Burden of Proof
 - (3) Relevant Conduct
 - (4) Considerations
 - (5) Continuing Obligation
 - (6) Determination
 - (7) Advisory Opinions
6. Admission by Examination
 - A. Dates of Examinations
 - B. Timely Filing Deadlines
 - C. Late Filing Deadlines
 - D. Denial of Opportunity to Test
 - E. Scope of Examination
 - (1) Essay and Multiple Choice
 - (2) Performance Test
 - F. Testing Accommodations
 - G. Examination Results
 - H. Failing Examination Scores
 - I. Stale Examination Scores
7. Admission Without Examination
 - A. Eligibility by Practice
 - B. Eligibility by Test Score
 - C. No Waiver of Time Requirements
 - D. Eligibility After Unsuccessful Examination
 - E. Ineligibility for Admission Without Examination
8. Temporary License for Legal Services Programs
 - A. Eligibility
 - B. Filing
 - C. Certification of Applicant's Good Character and Fitness

- D. Limitation
- E. Duration and Revocation
- F. Credit for Admission Without Examination
- 9. Temporary License for In-House Counsel
 - A. Eligibility
 - B. Requirements
 - C. Certification of the Applicant's Good Character and Fitness
 - D. Limitation
 - E. Duration and Revocation
- 10. License for Foreign Legal Consultants
 - A. Eligibility
 - B. Requirements
 - C. Applications
 - D. Investigation
 - E. Scope of Practice
 - F. Disciplinary Provisions
 - G. Annual Certification and Renewal Fees
- 11. Fees
 - A. General
 - B. Fee for Examination, Not Previously Admitted
 - C. Fee for Examination, Prior Admission
 - D. Repeat Examinations
 - E. Fee for Admission Without Examination
 - F. Fee for Temporary License for Legal Services Program Practice
 - G. Transfer of Rule 8 Application to Rule 6 or Rule 7 Application
 - H. Refunds of Fees
 - I. Carry-over of Fees
 - (1) Ineligible Rule 7 Applicants
 - (2) Medical Emergencies
 - J. Transfer of Examination Scores
 - K. Copies of Examination Answers
 - L. Other Fees
 - M. Fees for Advisory Opinions
- 12. Immunity
 - A. Immunity of the Board
 - B. Immunity of Persons or Entities Providing Information to the Board
- 13. Information Disclosure
 - A. Application File
 - B. Work Product
 - C. Examination Data
 - (1) Statistics
 - (2) Transferability of Examination Scores
 - (3) Disclosure of Examination Scores
 - D. Release of Information to Other Agencies
 - E. Referrals
 - F. Confidentiality
- 14. Adverse Determinations and Hearings
 - A. Adverse Determination
 - B. Request for Hearing
 - C. Scheduling of Hearing
 - D. Proceedings
 - E. Pre-Hearing Conference
 - F. Subpoenas
 - G. Continuances
 - H. Final Decision
- 15. Appeal to the Supreme Court
 - A. Petition for Review

- B. Board Response
- 16. Reapplication after Denial
- 17. Bar Admissions Advisory Council
 - A. Creation
 - B. Meetings
 - C. Expenses

INDEX

Revisor's Note: Supreme Court Order CS-84-2139, dated August 26, 1998, provides in part:

"The Rules of the Minnesota Supreme Court and State Board of Law Examiners for Admission to the Bar are repealed retroactive to August 18, 1998."

TEXT OF RULES

Rule 1. Purpose

The Board of Law Examiners is established to ensure that those who are admitted to the bar have the necessary competence and character to justify the trust and confidence that clients, the public, the legal system, and the legal profession place in attorneys.

Rule 2. Definitions

As used in these Rules:

- A. "Board" means the Minnesota State Board of Law Examiners.
- B. "Court" means the Minnesota Supreme Court.
- C. "Director" means the staff director for the Board.
- D. "Good character and fitness" means traits, including honesty, trustworthiness, diligence and reliability, that are relevant to and have a rational connection with the applicant's present fitness to practice law.
- E. Deadlines and due dates specified under these Rules shall be taken to mean no later than 4:30 p.m. on the date stated; if the date falls on Saturday, Sunday, or a legal holiday, the deadline shall be the first working day thereafter. Postmarks dated on the due date will be accepted.
- F. "Approved law school" means a law school provisionally or fully approved by the American Bar Association.
- G. "Legal services program" means a program existing primarily for the purpose of providing legal assistance to indigent persons in civil or criminal matters.
- H. "Notify" or "give notice" means to mail or deliver a document to the last known address of the applicant or the applicant's attorney. Notice is complete upon mailing, but extends the applicant's period to respond by 3 days.
- I. "Jurisdiction" means the District of Columbia or any state or territory of the United States.

(Amended effective March 14, 2000.)

Rule 3. State Board of Law Examiners

A. Composition. The State Board of Law Examiners shall consist of nine members, two of whom shall be public members, each appointed by the Supreme Court for a term of three years or until a successor is appointed and qualifies. With the exception of the President, Board members may serve no more than three successive three-year terms. The terms of office may be staggered by the Court by any method it deems appropriate. The Court shall select a President and the Board shall select a secretary from among its members.

B. Authority. The Board is authorized:

(1) Subject to the approval of the Court, to employ a Director on a full-time or part-time basis, to prescribe duties, and to fix compensation;

(2) To secure examination questions and other testing instruments that the Board finds valid and reliable in measuring the competence of applicants to practice law, and to pay reasonable compensation for them;

(3) To employ examination graders;

(4) To establish a minimum passing score for the examinations;

(5) To conduct investigations of applicant background as may be reasonably related to fitness to practice or eligibility under the Rules, and to require applicants to pay the costs of the investigations;

(6) To administer these Rules and adopt policies and procedures consistent with these Rules;

(7) To delegate to its President and Director authority to make necessary determinations to implement the Board's policies and procedures and these Rules;

(8) To prepare and disseminate information to prospective applicants and the public about procedures and standards for admission to practice law in this state.

C. Board Meetings. Board meetings are open to the public except when the Board is considering the following:

(1) examination materials;

(2) any information concerning an applicant or potential applicant;

(3) personnel matters;

(4) any information which is confidential or private under Rule 13;

(5) legal advice from its counsel.

Minutes of the public portions of Board meetings are available upon request from the Board office.

Rule 4. General Requirements for Admission

A. Eligibility for Admission. An applicant is eligible for admission to practice law upon establishing to the satisfaction of the Board:

(1) Age of at least 18 years;

(2) Good character and fitness as defined by these Rules;

(3) Graduation with a J.D. or LL.B. degree from a law school which is provisionally or fully approved by the American Bar Association;

(4) Passing score on a written examination or qualification under Rule 7(A) or (B);

(5) A scaled score of 85 or higher on the Multistate Professional Responsibility Examination; and

(6) Not currently suspended or disbarred from the practice of law in another jurisdiction.

B. Residency. Prior to admission an applicant must be a resident of this state or maintain an office in this state or designate the Clerk of the Appellate Courts as agent for the service of process for all purposes.

C. Application for Admission

(1) Complete Application. An applicant for admission shall file at the office of the Board an application on a form prescribed by the Board. To be accepted for filing, an application must include:

(a) The proper fee as indicated in Rule 11;

(b) Notarized affidavits of two persons unrelated to the applicant by blood or marriage and not fellow law students during the applicant's enrollment, who have known the applicant for at least one year, setting forth the duration of time and the circumstances under which they have known the applicant, details respecting the

applicant's character and general reputation and other such information which bears on the applicant's fitness to practice law;

(c) A notarized authorization for release of information on a form prescribed by the Board;

(d) For applicants seeking admission by examination, a passport-style photo.

(2) Certificate of Graduation. An applicant for admission by examination must also file or cause to be filed at least 30 days prior to the examination a certificate from an approved law school stating that the applicant has graduated, or stating that the applicant has fulfilled all requirements for graduation and will be graduated within 120 days following the examination for which the applicant has filed.

(3) Additional Filing When Admitted Elsewhere. An applicant who has been admitted to practice in another jurisdiction shall also file or cause to be filed at the time of the application:

(a) A certified copy of the application for admission to the Bar in each jurisdiction in which the applicant has previously been admitted to the practice of law;

(b) A certification showing the date of admission to the bar in each other jurisdiction;

(c) A certification from the proper authority in each jurisdiction stating that the applicant is in good standing, and indicating whether the applicant is the subject of a pending complaint or charge of misconduct.

(4) Professional Responsibility Test Scores. An applicant may file an application without having taken the Multistate Professional Responsibility Examination; however, the applicant shall submit a score report showing a scaled score of 85 or higher on the Multistate Professional Responsibility Examination prior to being admitted.

(5) Repeat Examinee. An applicant who has been unsuccessful on a prior Minnesota Bar Examination may reapply by submitting:

(a) A new application for admission pursuant to Rule 4(C)(1);

(b) The proper fee under Rule 11;

(c) A notarized authorization for release of information on a form prescribed by the Board;

(d) A passport-style photo;

(e) If the original application is more than two years old, new affidavits as described in Rule 4(C)(1)(b) of these Rules.

(6) Incomplete Application. An application determined to be incomplete shall be returned to the applicant.

(7) Withdrawal of Application. An applicant may withdraw the application at any time prior to the issuance of an adverse determination.

(8) Strict Enforcement of Time Requirements. The time requirements set forth in these Rules shall be strictly enforced.

D. Required Cooperation.

(1) An applicant has the duty to cooperate with the Board and the Director by timely complying with requests, including requests to:

(a) Provide complete information, documents and signed authorizations for release of information;

(b) Obtain reports or other information necessary for the Board to properly evaluate the applicant's fitness to practice;

(c) Appear for interviews to determine eligibility for admission or facilitate the background investigation.

(2) An applicant shall not discourage a person from providing information to the Board or retaliate against a person for providing information to the Board;

(3) An applicant who violates this rule may be denied an opportunity to test or may be denied admission.

(Amended effective March 14, 2000.)

Rule 5. Standards for Admission

A. Essential Eligibility Requirements. Applicants must meet the following essential eligibility requirements for the practice of law:

(1) The ability to reason, recall complex factual information and integrate that information with complex legal theories;

(2) The ability to communicate with clients, attorneys, courts, and others with a high degree of organization and clarity;

(3) The ability to use good judgment on behalf of clients and in conducting one's professional business;

(4) The ability to conduct oneself with respect for and in accordance with the law;

(5) The ability to avoid acts which exhibit disregard for the rights or welfare of others;

(6) The ability to comply with the requirements of the Rules of Professional Conduct, applicable state, local, and federal laws, regulations, statutes and any applicable order of a Court or tribunal;

(7) The ability to act diligently and reliably in fulfilling one's obligations to clients, attorneys, courts, and others;

(8) The ability to use honesty and good judgment in financial dealings on behalf of oneself, clients, and others; and

(9) The ability to comply with deadlines and time constraints.

B. Character and Fitness Standards and Investigation.

(1) **Purpose.** The purpose of character and fitness investigation before admission to the Bar is to assure the protection of the public and to safeguard the justice system.

(2) **Burden of Proof.** The applicant bears the burden of proving good character in support of the application.

(3) **Relevant Conduct.** The revelation or discovery of any of the following shall be treated as cause for further inquiry before the Board determines whether the applicant possesses the character and fitness to practice law:

(a) unlawful conduct;

(b) academic misconduct;

(c) misconduct in employment;

(d) acts involving dishonesty, fraud, deceit or misrepresentation;

(e) acts which demonstrate disregard for the rights or welfare of others;

(f) abuse of legal process, including the filing of vexatious or frivolous lawsuits;

(g) neglect of financial responsibilities;

(h) neglect of professional obligations;

(i) violation of an order of a court, including child support orders;

(j) conduct that evidences current mental or emotional instability that may impair the ability to practice law;

(k) conduct that evidences current drug or alcohol dependence or abuse that may impair the ability to practice law;

(l) denial of admission to the Bar in another jurisdiction on character and fitness grounds;

(m) disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction;

(n) making of false statements, including omissions, on bar applications in this state or any other jurisdiction.

(4) Considerations. The Board shall determine whether the present character and fitness of an applicant qualifies the applicant for admission. In making this determination, the following factors should be considered in assigning weight and significance to prior conduct:

- (a) the applicant's age at the time of the conduct;
- (b) the recency of the conduct;
- (c) the reliability of the information concerning the conduct;
- (d) the seriousness of the conduct;
- (e) the factors underlying the conduct;
- (f) the cumulative effect of the conduct or information;
- (g) the evidence of rehabilitation;
- (h) the applicant's positive social contributions since the conduct;
- (i) the applicant's candor in the admissions process;
- (j) the materiality of any omissions or misrepresentations.

(5) Continuing Obligation. The applicant has a continuing obligation to update the application with respect to all matters inquired of on the application. This obligation continues during the pendency of the application, including the period when the matter is on appeal to the Board or the Court.

(6) Determination. A character and fitness determination shall be made with respect to each applicant who is a successful examinee or who is qualified by practice for admission under these Rules. An adverse determination on character and fitness grounds may be appealed under Rule 14.

(7) Advisory Opinions.

(a) A law student may request a written advisory opinion from the Board with respect to his or her character and fitness for admission by filing the following:

- (1) A completed application for admission;
- (2) A fee in the amount required under Rule 11;
- (3) Two notarized affidavits as required by Rule 4(C)(1)(b);
- (4) An authorization for release of information as required by Rule 4(C)(1)(c).

(b) Advisory opinions will not be binding on the Board.

Rule 6. Admission by Examination

A. Dates of Examinations. Examinations shall be held the last Tuesday and Wednesday of the months of February and July each year, at a place to be determined by the Board.

B. Timely Filing Deadlines. An application for admission by examination shall be filed in the office of the Board by October 15 for the February examination, or by March 15 for the July examination.

C. Late Filing Deadlines. Late applications will be accepted on or before December 1 for the February examination, or on or before May 1 for the July examination but must be accompanied by the late filing fee pursuant to Rule 10. No applications shall be accepted after the late filing deadline.

D. Denial of Opportunity to Test. An applicant may be denied permission to take an examination:

- (1) If the applicant has failed to comply with the requirements of Rule 4(C);
- (2) If the Board has determined the applicant has not satisfied the good character and fitness requirement of Rule 4(A)(2).

E. Scope of Examination. The Minnesota Bar Examination shall consist of the following:

(1) **Essay and Multiple Choice.** Essay questions and multiple choice questions on any combination of the following subjects:

- Administrative Law
- Civil Procedure
- Constitutional Law
- Contracts
- Criminal Law and Procedure
- Ethics and Professional Responsibility
- Evidence
- Family Law
- Federal Individual Income Taxation
- Partnership, Proprietorship, and Corporations
- Real Property
- Torts
- Uniform Commercial Code, Art. 1, 2
- Wills, Estates and Trusts; and

(2) **Performance Test.** Commencing with the February 2001 examination, one or more questions to test the applicant's ability to perform a lawyering task using legal and factual materials provided.

F. Testing Accommodations. An applicant whose disability requires testing accommodations shall submit with the application a written request pursuant to the Board's testing accommodations policy and shall describe:

- (1) The type of accommodation requested;
- (2) The reasons for the requested accommodation, including medical documentation in a format set forth in the policy referenced above.

The Board shall notify the applicant of its decision. A denial or modification of a request for testing accommodations constitutes an adverse determination of the Board and may be appealed pursuant to Rule 14.

G. Examination Results. The results of the examination shall be released to examinees by regular mail to the address listed in the files of the Board, and successful examination numbers will be posted at the Court and at each Minnesota law school. The date of the release shall be announced at the examination.

H. Failing Examination Scores. A failing score on the bar examination represents a final decision of the Board and does not afford the applicant the appeal and hearing rights set forth in Rule 14.

I. Stale Examination Scores. A passing score on the Minnesota bar examination is valid for 24 months from the date of the examination. Applicants must be admitted within 24 months of the examination.

Rule 7. Admission Without Examination

A. Eligibility by Practice. An applicant may be eligible for admission without examination if the applicant otherwise qualifies for admission under Rule 4 and provides documentary evidence showing that for at least five of the seven years immediately preceding the application, the applicant has been licensed to practice law, has been in good standing in the highest court of another jurisdiction, and as principal occupation, has been actively and lawfully engaged in the practice of law as:

- (1) a sole practitioner;
- (2) a member of a law firm, professional corporation or association;
- (3) a judge in a court of record;

- (4) an attorney for any local or state governmental entity;
- (5) inside counsel for a corporation, agency, association or trust department;
- (6) an attorney with the federal government or a federal governmental agency including service as a member of the Judge Advocate General's Department of one of the military branches of the United States; and/or
- (7) a professor teaching full-time in any approved law school.

The practice of law must have been in the jurisdiction where the applicant is licensed and during the period of licensure unless the practice falls under (6) or (7) above, or Rule 8F of these Rules.

B. Eligibility by Test Score. An applicant may be eligible for admission without examination under Rule 4(A)(4) if the applicant has received a scaled score of 145 or above on the Multistate Bar Examination taken as a part of and at the same time as the essay or other part of a written bar examination given by another jurisdiction, was successful on that bar examination and subsequently admitted in that jurisdiction. Evidence of the score and a completed application must be received at the office of the Board within 24 months of the date of the examination that is being used as the basis for the admission.

C. No Waiver of Time Requirements. The minimum time requirements and the timely filing requirements of this Rule shall be strictly enforced.

D. Eligibility After Unsuccessful Examination. An applicant may be eligible for admission without examination under this Rule notwithstanding a prior failure on the Minnesota Bar Examination.

E. Ineligibility for Admission Without Examination. Any person who holds himself or herself out as a licensed Minnesota attorney or attempts to engage in the practice of law in Minnesota without first obtaining a license under these Rules is ineligible for admission without examination.

(Amended effective March 14, 2000.)

Rule 8. Temporary License for Legal Services Programs

A. Eligibility. An attorney licensed in another state, or the District of Columbia, may apply for and obtain a temporary license to practice law in Minnesota when the applicant has accepted employment in Minnesota as an attorney for a legal services program.

B. Filing. In order to qualify for the license, the attorney must comply with the requirements of Rule 4(A)(1), (2), (3) and (6) and must file with the Board, the following:

- (1) A completed application for temporary license to practice law in Minnesota for a legal services program;
- (2) A certificate of the highest court of the state of licensure certifying that the attorney is in good standing and that no charges of professional misconduct are pending;
- (3) An affidavit from the applicant's employer attesting to his/her knowledge of the applicant's competence and good character, and the fact that the applicant has accepted employment as an attorney for a legal services program in Minnesota and will be supervised by a licensed Minnesota attorney;
- (4) Two additional affidavits of character as prescribed by Rule 4(C)(1), and a fee consistent with Rule 11(F) of these Rules.

C. Certification of Applicant's Good Character and Fitness. The office of the Board shall conduct an expedited character and fitness investigation and certify the applicant's good character and fitness prior to issuance of a license under this Rule.

D. Limitation. A license granted pursuant to this Rule shall authorize the attorney to practice solely on behalf of the indigent clients of the designated legal services program.

E. Duration and Revocation. This temporary license shall be valid for a period of no more than 15 months from the date of issuance. Upon notice to the Clerk of the Appellate Courts, the Board shall have authority to revoke a temporary license issued pursuant to this Rule upon the occurrence of any of the following:

- (1) The holder's admission to practice law in Minnesota pursuant to Rule 6 (Admission by Examination), Rule 7(A)(Eligibility by Practice) or 7(B)(Eligibility by Test Score);
- (2) Termination of the holder's employment with the employer referred to in Rule 7(B)(3);
- (3) The lapse of 15 months from the date of issuance;
- (4) The holder's failing the Minnesota Bar Examination; or
- (5) Issuance by the Board of an adverse determination relative to the applicant's character and fitness.

F. Credit for Admission Without Examination. Time in the practice of law in the State of Minnesota under this temporary license may be counted toward the applicant's eligibility for admission without examination under Rule 7(A).

Rule 9. Temporary License for In-House Counsel

A. Eligibility. An attorney licensed in another state or the District of Columbia may apply for and obtain a temporary license to practice law in Minnesota when the applicant is employed in Minnesota as an attorney solely for a single corporation (or its subsidiaries), association, business or governmental entity whose lawful business consists of activities other than the practice of law or the provision of legal services.

B. Requirements. In order to qualify for the license, the attorney must file with the Board of Law Examiners the following:

- (1) A completed application for license to practice law in Minnesota;
- (2) A certificate of the highest court of the state of licensure certifying that the attorney is in good standing and that no charges of professional misconduct are pending;
- (3) An affidavit from an officer, director or general counsel of applicant's employer or parent company employer attesting to the fact that applicant is employed as an attorney solely for said employer, that applicant is an individual of good character, and that the nature of the employment meets the requirements of section A of this Rule;
- (4) An affidavit of applicant attesting to applicant's full-time practice of law for at least five of the previous seven years;
- (5) A fee consistent with Rule 11(E).

C. Certification of the Applicant's Good Character and Fitness. An expedited character and fitness investigation will be conducted and the Director's initial certification of the applicant's good character and fitness made before issuance of a license pursuant to this Rule.

D. Limitation. A license granted pursuant to this Rule shall authorize the attorney to practice solely for the designated employer.

E. Duration and Revocation. This Temporary License shall be valid for a period of no more than twelve months from the date of issuance. Upon notice to the Clerk of Appellate Courts, the Board shall have authority to revoke a temporary license issued pursuant to this Rule upon the occurrence of any of the following:

- (1) The holder's admission to practice law in Minnesota pursuant to Rule 6 (Admission by Examination), Rule 7(A) (Eligibility by Practice) or Rule 7(B) (Eligibility by Examination Score);
- (2) Termination of holder's employment with the employer referenced in Rule 9(B)(3);
- (3) Issuance of an adverse determination pursuant to Rule 14(A).

Rule 10. License for Foreign Legal Consultants

A. Eligibility. A person who is admitted to practice in a foreign country as an attorney or counselor at law may apply for, and at the discretion of the Board of Law Examiners, may obtain a license to render services as a foreign legal consultant in the State of Minnesota, without examination, subject to the limitations set forth in this Rule.

B. Requirements. In order to qualify for the license the applicant must:

(1) have been admitted to practice in a foreign country as an attorney or counselor at law or the equivalent; and

(2) as principal occupation, have been engaged in the practice of law of that country in that country for at least five of the seven years immediately preceding the application; and

(3) be in current good standing as an attorney or counselor at law or the equivalent in that country, and have remained in good standing throughout the period of his/her practice; and

(4) possess the good character and fitness required for admission to practice in this state; and

(5) be at least 24 years of age; and

(6) maintain an office in the state of Minnesota for the rendering of services as a foreign legal consultant.

C. Applications. In order to qualify for the foreign legal consultant license, an applicant must file with the Minnesota Board of Law Examiners the following documents, together with duly authenticated English translations, if they are not in English:

(1) a sworn and notarized typewritten Application for Foreign Legal Consultant License;

(2) a duly authenticated certificate from the authority having final jurisdiction over professional discipline in the foreign country in which the applicant is admitted to practice; which shall be accompanied by the official seal, if any, of such authority, and which shall certify:

(a) the authority's jurisdiction in such matters;

(b) the applicant's admission to practice in such foreign country, the date of admission, and the applicant's good standing as an attorney or counselor at law or the equivalent in that jurisdiction;

(3) a duly authenticated document from any foreign country or jurisdiction in which said consultant has been licensed as an attorney or as a foreign legal consultant indicating whether any charge or complaint has ever been filed against the applicant with such authority, if so, the substance of each such charge or complaint, and the adjudication or resolution of each such charge or complaint;

(4) a letter or recommendation signed by, and accompanied with the official seal, if any, of one of the members of the executive body of such authority or from one of the judges of the highest court of law of such foreign country, certifying to the applicant's professional qualifications;

(5) a summary of the law or rule, if any, of such foreign country which permits members of the bar of Minnesota to establish offices for the giving of legal advice to clients in such foreign country;

(6) letters of recommendation from at least three attorneys or counselors at law or the equivalent admitted in and practicing in such foreign country, setting forth the length of time, and under what circumstances they have known the applicant and stating their appraisal of the applicant's good character and fitness for admission;

(7) notarized letters of recommendation from at least two members in good standing of the Minnesota Bar, setting forth the length of time, and under what circumstances they have known the applicant and their appraisal of the applicant's good character and fitness for admission;

(8) such other evidence as to the applicant's educational and professional qualifications, good character and fitness and compliance with the requirements of this rule as the Minnesota Board of Law Examiners may require; and

(9) a fee in the amount of \$1,000, in the form of a certified check or money order.

D. Investigation. The Minnesota Board of Law Examiners shall conduct such investigation into the applicant's background and verification of supporting documents as the Board may deem appropriate or necessary in the circumstances.

E. Scope of Practice. A person licensed as a foreign legal consultant under this rule may render legal services in the State of Minnesota regarding the laws of the country in which such person is admitted to practice as an attorney, counselor at law or equivalent. The foreign legal consultant shall not, however, conduct any activity or render any services constituting the practice of the law of the United States, the State of Minnesota, or that of any other state, commonwealth or territory of the United States or the District of Columbia including, but not limited to, the restrictions that such person shall not:

(1) appear for another person as attorney in any court or before any magistrate or other judicial officer or before any federal, state, county or municipal governmental agency, quasi-judicial or quasi-governmental authority in the State of Minnesota, or prepare pleadings or any other papers in any action or proceedings brought in any such court or before any such judicial officer, except as authorized in any rule or procedure relating to admission pro hac vice, or pursuant to administrative rule;

(2) provide legal advice in connection with the preparation of any deed, mortgage, assignment, discharge, lease, agreement of sale or any other instrument affecting title to:

(a) real property located in the United States of America;

(b) personal property located in the United States of America, except where the instrument affecting title to such personal property is governed by the law of a jurisdiction in which the foreign legal consultant is admitted to practice as an attorney or counselor at law or the equivalent;

(3) prepare:

(a) any will or trust instrument affecting the disposition of any property located in the United States of America and owned by a resident thereof;

(b) any instrument relating to the administration of a decedent's estate in the United States of America;

(4) prepare any instrument in respect of the marital relations, rights or duties of a resident of the United States of America or the custody or care of the children of such a resident;

(5) render professional legal advice on the law of the State of Minnesota or the United States of America or any other state, subdivision, commonwealth or territory of the United States of America or the District of Columbia (whether rendered incident to the preparation of a legal instrument or otherwise);

(6) in any way represent that such person is admitted to the Bar of the State of Minnesota or is licensed as an attorney or foreign legal consultant in another state, territory or the District of Columbia, or as an attorney or counselor at law or the equivalent in a foreign country, unless so licensed;

(7) use any title other than "Foreign Legal Consultant, Not Admitted to Practice Law in Minnesota", provided that such person's authorized title and firm name in the foreign country in which such person is admitted to practice as attorney or counselor at law or the equivalent may be used if the title, firm name, and the name of such foreign country are stated together with the above-mentioned designation;

(8) render any legal services for a client without utilizing a written retainer agreement which shall specify in bold type that the foreign legal consultant is not

admitted to practice law in the State of Minnesota, nor licensed to advise on the laws of the United States or the District of Columbia, and that the practice of the foreign legal consultant is limited to the laws of the foreign country where such person is admitted to practice as an attorney or counselor at law or the equivalent; or

(9) hold any client funds or valuables without entering into a written retainer agreement which shall specify in bold type the name of a Minnesota licensed attorney in good standing who is also representing the particular client in the particular matter at hand.

F. Disciplinary Provisions.

(1) A foreign legal consultant is expressly subject to the Minnesota Rules of Professional Conduct and to continuing review of qualifications to retain any license granted hereunder, and shall be subject to the disciplinary jurisdiction of the Minnesota Office of Lawyers Professional Responsibility and the Minnesota Supreme Court.

(2) Section 1 above shall not be construed to limit in any way concurrent disciplinary procedures to which the foreign legal consultant may be subject in the country of admission.

(3) A foreign legal consultant shall execute and file with the Board of Law Examiners, in such form and manner as the court prescribes:

(a) a statement that the foreign legal consultant has read, understood, and made a commitment to observe the Minnesota Rules of Professional Conduct; and

(b) either:

(1) an undertaking or appropriate evidence of professional liability insurance, in such amount as the Minnesota Supreme Court may prescribe, to assure such foreign legal consultant's proper professional conduct and responsibility; or

(2) an appropriate undertaking in the amount of \$50,000 in the form of a bond, letter of credit or other financial guaranty instrument issued by a reputable financial institution based in, and authorized to do business in, the United States of America or any state therein for the purpose of assuring the foreign legal consultant's proper professional conduct and responsibility; and

(c) a duly acknowledged instrument in writing setting forth such foreign legal consultant's address within the State of Minnesota and designating the Clerk of the Appellate Courts as agent for the service of process for all purposes; and

(d) a commitment to notify the Minnesota Board of Law Examiners of any resignation or revocation of such foreign legal consultant's admission to practice in the foreign country of admission, or in any other state or jurisdiction in which the foreign legal consultant has been licensed as an attorney or counselor at law or equivalent or as a foreign legal consultant, or of any censure, suspension, or expulsion in respect of such admission.

G. Annual Certification and Renewal Fees.

(1) A foreign legal consultant shall submit on a biennial basis to the Minnesota Board of Law Examiners:

(a) a sworn statement attesting to his/her continued good standing as an attorney or counselor at law, or equivalent in the foreign country in which he/she is admitted to practice;

(b) a fee in the amount of \$200.

(2) The foreign legal consultant shall submit on an annual basis to the Minnesota Attorney Registration office an attorney registration fee equivalent to the renewal fees paid by Minnesota licensed attorneys pursuant to the Rules of the Supreme Court for Registration of Attorneys.

Rule 11. Fees

A. General. All application fees required under these rules shall be paid by certified check, money order or bank draft payable to the Board. All other fees and

charges may be paid by personal check or money order. The applicable fee is determined as of the date of filing of a complete application under Rule 4.

B. Fee for Examination, Not Previously Admitted. An applicant taking the examination for the first time and filing on or before October 15 for the February examination, or on or before March 15 for the July examination, shall submit a fee of \$300. An application for the examination submitted after the timely filing date but on or before December 1 for the February examination, or on or before May 1 for the July examination, shall include a fee of \$450.

C. Fee for Examination, Prior Admission. An applicant licensed to practice in another jurisdiction more than six months prior to the date of the Minnesota examination and timely filing shall submit a fee of \$625. An application for examination submitted after the timely filing date but on or before December 1 for the February examination, or on or before May 1 for the July examination, shall include a fee of \$775. An applicant licensed to practice in another jurisdiction less than six months prior to the date of the Minnesota examination, shall comply with paragraph B of this Rule.

D. Repeat Examinations. An applicant who has previously been unsuccessful on the examination and filing on or before December 1 for the February examination, or on or before May 1 for the July examination, shall include a fee of \$300 and comply with Rule 4(C)(5).

E. Fee for Admission Without Examination. An applicant for admission without examination shall submit a fee of \$625. An applicant for admission pursuant to Rule 9 shall submit a fee of \$825.

F. Fee for Temporary License for Legal Services Program Practice. A fee in the amount of \$50 must accompany an application for Temporary License pursuant to Rule 8. Payment of an additional fee, as required by Rule 11(B), will qualify applicants under Rule 6. Payment of an additional fee, as required by Rule 11(C), will qualify applicants under Rule 7(A) or 7(B).

G. Transfer of Rule 8 Application to Rule 6 or Rule 7 Application. Documents submitted in support of a Rule 8 (Temporary License for Legal Services Programs) application for license may, upon the written request of applicant, constitute application pursuant to Rule 6 (Admission by Examination) or Rule 7 (Admission Without Examination) of these Rules, provided additional fees required by Rule 11 are submitted.

H. Refunds of Fees. An applicant may request a refund in the amount of \$100 in the following circumstances:

(1) If the applicant who advises the Board in writing at least four days prior to an examination of the applicant's desire to withdraw the application;

(2) If the applicant was denied permission to take an examination for failure to provide a certificate of graduation required by Rule 4(C)(2)(a).

No other requests for refund will be granted.

I. Carry-over of Fees.

(1) **Ineligible Rule 7 Applicants.** The fee of an applicant declared ineligible under Rule 7 (Admission Without Examination) shall be applied to an examination held within the succeeding 15 months at the written request of the applicant received within 30 days of notice of the denial. No other transfers of fees, other than those provided for in the following paragraph, shall be granted.

(2) **Medical Emergencies.** An applicant who is unable to sit for the examination due to a medical emergency and who notifies the Board prior to the examination, may request carry-over of the application fee to the next examination. Such requests must be made in writing and be accompanied by written documentation of the medical emergency.

J. Transfer of Examination Scores. A request for transfer of scores pursuant to Rule 6(H) shall include a fee of \$25. A score report may be obtained by submitting payment of \$25 to the National Conference of Bar Examiners.

K. Copies of Examination Answers. An unsuccessful applicant may request copies of the applicant's essay answers upon written request to the Board within 60 days of the release of the examination results and submission of a fee of \$15.

L. Other Fees. The Board may require an applicant to bear the expense of obtaining reports or other information necessary for the Board's investigation. The Board may charge reasonable fees for collection and publication of any information permitted to be released. For matters not covered in these Rules, the Director may set reasonable fees which reflect the administrative costs associated with the service.

M. Fees for Advisory Opinions. An application filed for the purpose of receiving an advisory opinion from the Board must be accompanied by a fee in the amount of \$100.

Rule 12. Immunity.

A. Immunity of the Board. The Board and its members, employees, and agents are immune from civil liability for conduct and communications relating to their duties under these Rules or the Board's policies and procedures.

B. Immunity of Persons or Entities Providing Information to the Board. Any person or entity providing to the Board or its members, employees or agents, any information, statements of opinion, or documents regarding an applicant or potential applicant is immune from civil liability for such communications.

Rule 13. Information Disclosure

A. Application File. An applicant may review the contents of his or her application file with the exception of the work product of the Board and its staff. Such review must take place within two years after the filing of the last application for admission in Minnesota, at such times and under such conditions as the Board may provide.

B. Work Product. The Board's work product shall not be produced or otherwise discoverable, nor shall any member of the Board or its staff be subject to deposition or compelled testimony except upon a showing of extraordinary circumstance and compelling need and upon order of the Court. In any event, the mental impressions, conclusions, and opinions of the Board or its staff shall be protected and not subject to compelled disclosure.

C. Examination Data.

(1) **Statistics.** Statistical information relating to examinations and admissions may be released at the discretion of the Board.

(2) **Transferability of Examination Scores.** The Director may advise an examinee whether an examination score is sufficient under the rules of a jurisdiction, upon written request of the examinee, identifying by month and year the Minnesota examination taken, the exact name on the examination, and a copy of the rules of the jurisdiction in which the examinee is interested.

(3) **Disclosure of Examination Scores.** The scores of an examinee may be disclosed:

(a) Upon written request of the examinee and payment of the fee under Rule 11(J), to the bar admission authority of a jurisdiction;

(b) At the discretion of the Board, to the law school from which the examinee graduated;

(c) To an unsuccessful examinee, the scores assigned to each of the various portions of the examination, and copies of answers to the essays pursuant to Rule 11(K).

D. Release of Information to Other Agencies. Information may be released to any authorized lawyer disciplinary agency, bar admissions authority or to persons or other entities in furtherance of the character and fitness investigation.

E. Referrals. Information relating to the misconduct of an applicant may be referred to the appropriate authority.

F. Confidentiality. Subject to the exceptions contained in Rule 3(C) and this rule, all other information contained in the files of the office of the Board is confidential and shall not be released to anyone other than the Court except upon order of the Court.

Rule 14. Adverse Determinations and Hearings

A. Adverse Determination. When an adverse determination relating to an applicant's character, fitness or eligibility is made by the Board, the Director shall notify the applicant of the determination, the reasons for the determination, the right to request a hearing, the right to be represented by counsel, and the right to present witnesses and evidence.

B. Request for Hearing. Within 20 days of notice of an adverse determination, the applicant may make a written request for a hearing. If the applicant does not timely request a hearing, the adverse determination becomes the final decision of the Board.

C. Scheduling of Hearing. The Board shall schedule a hearing upon receipt of the applicant's request for a hearing. At least 30 days prior to the hearing, the Board shall notify the applicant of the time and place.

D. Proceedings. In the discretion of the Board President, the hearing may be held before the full Board, before a sub-committee of the Board appointed by the President, or before a hearing examiner appointed by the President. The Board may employ special counsel. The hearing shall be recorded and a transcript shall be provided to the applicant on request at a reasonable cost.

E. Pre-Hearing Conference. The Board President or designee shall conduct a prehearing conference to address procedural issues. Unless the President or designee orders otherwise, Board counsel and the applicant shall exchange exhibit lists and the names and addresses of witnesses at least ten days before the hearing.

F. Subpoenas. Upon written authorization of the Board President or designee, the applicant and Board counsel may subpoena evidence and witnesses for the hearing. The District Court of Ramsey County shall issue subpoenas.

G. Continuances. A written request for a continuance of a scheduled hearing shall be heard by the Board President or designee, who shall grant such request only upon a showing of good cause.

H. Final Decision. Following the hearing, the Board shall notify the applicant of its findings of fact, conclusions of law and final decision.

Rule 15. Appeal to the Supreme Court

A. Petition for Review. Any applicant who is adversely affected by a final decision of the Board may appeal to the Court by filing a petition for review with the Clerk of Appellate Courts within 20 days of receipt by the applicant of a final decision of the Board together with proof of service of the petition on the Director of the Board. The petition shall briefly state the facts that form the basis for the complaint, and the applicant's reasons for believing the Court should review the decision.

B. Board Response. Within 20 days of service of the petition, the Board shall serve and file a response to the petition and a copy of the final decision of the Board. Thereupon the Court shall give such directions, hold such hearings and make such order as it may in its discretion deem appropriate.

Rule 16. Reapplication After Denial

After expiration of the time for appeal allowed in Rule 14(B) or Rule 15(A), or after denial of petition by the Court, an applicant determined not to have satisfied the character and fitness requirement is prohibited from reapplying for admission to practice in Minnesota for three years from the date of the Board's adverse determination.

Rule 17. Bar Admissions Advisory Council

A. Creation. There shall be an Advisory Council consisting of representatives of the State Bar Association and of each of the Minnesota law schools to consult with the Board on matters of general policy concerning admissions to the Bar, amendments to the Rules and other matters related to the work of the Board.

B. Meetings. The Secretary of the Board shall call a joint meeting of the Advisory Council and the Board at least once each year. The Council shall meet at such other time as it may determine or when called by the Court or the Board.

C. Expenses. The members of the Advisory Council shall receive no compensation or reimbursement of expenses and shall serve for terms of three years.

INDEX - ADMISSION TO THE BAR

ADMISSION TO BAR

Admission by examination
 Dates of examinations, Rule 6.A
 Examination results
 Failing scores, Rule 6.H
 Stale scores, Rule 6.I
 Successful numbers, Rule 6.G
 Late filing deadlines, Rule 6.C
 Opportunity to test, denial, Rule 6.D
 Scope of examination, Rule 6.E
 Testing accommodations, Rule 6.F
 Timely filing deadlines, Rule 6.B
 Admission without examination
 Eligibility to practice
 Eligibility after prior unsuccessful examination, Rule 7.D
 Ineligibility, Rule 7.E
 Multistate test score, Rule 7.B
 Practice in another jurisdiction, Rule 7.A
 Temporary licenses, legal services practice, Rule 8.F
 Time requirements, waivers prohibited, Rule 7.C
 Applicants
 Access to data
 Application file, Rule 13.A
 Misconduct
 Release of information to other agencies, Rule 13.E
 Reapplication after denial
 Generally, Rule 16
 Requirements for admission, generally, Rule 4.A to Rule 4.D
 Applications
 Requirements, Rule 4.C
 Cooperation
 Requirements, Rule 4.D
 Eligibility
 Requirements, Rule 4.A
 Fees
 Admission without examination, Rule 11.E
 Advisory opinions, Rule 11.M
 Application fees
 Requirements, Rule 11.A
 Carry-over of fees, Rule 11.I
 Examination answers, copies, Rule 11.K
 Fee for examination
 Not previously admitted, Rule 11.B
 Prior admission, Rule 11.C
 Repeat examinations, Rule 11.D
 Other fees, Rule 11.L
 Refund of fees
 Limitations, Rule 11.H
 Temporary license
 Legal services program practice, Rule 11.F
 Transfer of examination scores, Rule 11.J
 Transfer of Rule 8 application to Rule 6 or Rule 7 application
 Additional fees, requirements, Rule 11.G
 Foreign legal consultants
 Annual certification, requirements, Rule 10.G
 Applications, requirements, Rule 10.C
 Background investigations, Rule 10.D
 Disciplinary actions against, Rule 10.F
 Eligibility, Rule 10.A
 Renewal fees, requirements, Rule 10.G
 Requirements, Rule 10.B
 Scope of practice, limitations, Rule 10.E
 Law examiners board, see **LAW EXAMINERS BOARD**
 Requirements for admission
 Generally, Rule 4
 Residency
 Requirements, Rule 4.B
 Standards
 Character and fitness, Rule 5.B
 Essential eligibility requirements, Rule 5.A
 Investigation, Rule 5.B

ADMISSION TO BAR (Cont'd)

Temporary licenses
 In-house counsel
 Character and fitness, certification, Rule 9.C
 Duration, Rule 9.E
 Eligibility, Rule 9.A
 Limitations, Rule 9.D
 Requirements, Rule 9.B
 Revocation, Rule 9.E
 Legal services programs
 Credit, admission without examination, Rule 8.F
 Duration, Rule 8.E
 Eligibility, Rule 8.A
 Limitations, Rule 8.D
 Requirements, Rule 8.B, Rule 8.C
 Revocation, Rule 8.E

BAR ADMISSIONS ADVISORY COUNCIL

Establishment, Rule 17.A
 Meetings, Rule 17.B
 Members
 Compensation and salaries, Rule 17.C
 Generally, Rule 17.A
 Term of service, Rule 17.C

CONTINUANCES

Hearings
 Law examiners board, Rule 14.G

DEFINITIONS

Approved law school, Rule 2.F
 Deadlines, Rule 2.E
 Due dates, Rule 2.E
 Give notice, Rule 2.H
 Good character and fitness, Rule 2.D
 Jurisdiction, Rule 2.I
 Legal services program, Rule 2.G
 Notify, Rule 2.H

HEARINGS

Law examiners board
 Continuances, Rule 14.G
 Final decisions
 Appeals from, Rule 15.A
 Notice requirements, Rule 14.H
 Pre-hearing conferences, Rule 14.E
 Procedure, generally, Rule 14.D
 Request for hearings
 Time limits, Rule 14.B
 Scheduling, requirements, Rule 14.C
 Subpoenas, Rule 14.F

LAW EXAMINERS BOARD

Adverse determinations
 Notice to applicants, requirements, Rule 14.A
 Authority, Rule 3.B
 Definitions, Rule 2
 Director
 Fees
 Duties, Rule 11.L
 Disclosure
 Examination data, Rule 13.C
 Release of information of other agencies, Rule 13.D, Rule 13.E
 Examination data
 Generally, Rule 13.C
 Hearings, see **HEARINGS**
 Immunity from liability
 Generally, Rule 12.A
 Meetings
 Open to public
 Exceptions, Rule 3.C
 Generally, Rule 3.C
 Members
 Appointment, Rule 3.A
 Term of service, Rule 3.A
 Purpose, Rule 1

LAW EXAMINERS BOARD (Cont'd)

Records

Confidential data, Rule 13.F

Work product

Disclosure, prohibited, Rule 13.B

PRIVILEGES AND IMMUNITY

Law examiners board

Immunity from liability

Generally, Rule 12.A

Informants, Rule 12.B

SUBPOENAS

Issuance

Ramsey County District Court, duties

Law examiners board hearings, Rule 14.F

SUPREME COURT

Appeals to

Final decisions, law examiners board

Generally, Rule 15.A, Rule 15.B

Appointments by

Members

Law examiners board, Rule 3.A

Character and Fitness Standards

Adopted and Effective September 20, 1988
With amendments received through August 1, 2000

TEXT OF STANDARDS

Purpose

The primary purpose of character and fitness screening before admission to the Bar of Minnesota is to assure the protection of the public and to safeguard the justice system. The attorney licensing process is incomplete if only testing for minimal competence is undertaken. The public is adequately protected only by a system that evaluates the character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their attorneys.

Organization and Funding

The Minnesota Board of Law Examiners, a body appointed by and responsible to the Minnesota Supreme Court, shall administer character and fitness screening. It shall perform its duties in a manner that assures the protection of the public by recommending for admission only those who qualify. Sufficient funding and staffing shall be maintained in order to permit appropriate investigation of all information pertaining to applicants' character and fitness.

The Investigative Process

The Rules of the Minnesota Board of Law Examiners place on the applicant the burden of proving good character by producing documentation, reports and witnesses in support of the application. Each investigation shall be initiated by requiring the applicant to execute under oath a thorough application and to sign an authorization and release form that extends to the Minnesota Board of Law Examiners and to any persons or institutions supplying information thereto. The applicant shall be informed of the consequences of failing to produce information requested by the application and of making material omissions or misrepresentations.

Standard of Character and Fitness

An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant may constitute a basis for denial of admission.

Relevant Conduct

The revelation or discovery of any of the following should be treated as cause for further inquiry before the Minnesota Board of Law Examiners decides whether the applicant possesses the character and fitness to practice law:

- unlawful conduct
- academic misconduct
- misconduct in employment
- acts involving dishonesty, fraud, deceit or misrepresentation
- acts which disregard the health, safety and welfare of others
- abuse of legal process, including the filing of vexatious lawsuits
- neglect of financial responsibilities
- neglect of professional obligations
- violation of an order of a court, including child support orders

evidence of mental or emotional instability
evidence of drug or alcohol dependence or abuse
denial of admission to the Bar in another jurisdiction on character and fitness grounds
disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction
making of false statements, including omissions of Bar applications

Use of Information

The Minnesota Board of Law Examiners shall determine whether the present character and fitness of an applicant qualifies the applicant for admission. In making this determination through the processes described above, the following factors should be considered in assigning weight and significance to prior conduct:

the applicant's age at the time of the conduct
the recency of the conduct
the reliability of the information concerning the conduct
the seriousness of the conduct
the factors underlying the conduct
the cumulative effect of conduct or information
the evidence of rehabilitation
the applicant's positive social contributions since the conduct
the applicant's candor in the admissions process
the materiality of any omissions or misrepresentations

The investigation conducted by the Minnesota Board of Law Examiners shall be thorough in every respect and shall be concluded expeditiously.

Student Practice Rules

Adopted May 24, 1982
With amendments received through August 1, 2000

TABLE OF HEADNOTES

Rule 1. General Student Practice

- 1.01 Representation
- 1.02 Eligible Law Students
- 1.03 Certification
- 1.04 Supervisory Attorney
- 1.05 Miscellaneous

Rule 2. Clinical Student Practice

- 2.01 Representation
- 2.02 Eligible Law Students
- 2.03 Certification
- 2.04 Supervisory Attorney
- 2.05 Miscellaneous

TEXT OF RULES

Rule 1. General Student Practice

1.01 Representation

An eligible law student not enrolled in a law school clinical program may, under the supervision of a member of the bar, perform all functions that an attorney may perform in representing and appearing on behalf of any state, local, or other government unit or agency, or any indigent person who is a party to a civil action or who is accused of a crime, or a petty misdemeanor.

1.02 Eligible Law Students

An eligible law student is one who:

(1) is duly enrolled at the time of original certification in a school of law in Minnesota approved by the American Bar Association;

(2) has completed at the time of original certification legal studies equivalent to at least two semesters of full-time study;

(3) has been certified by the state, local, or other government unit or agency, or organization or persons representing indigents as being a paid or unpaid intern working for said unit, agency, organization, or persons;

(4) has been certified by the dean or designee of the law school as being of good academic standing; and

(5) has been identified as a student and accepted by the client.

1.03 Certification

The state, local, or other government unit or agency or organization or persons representing indigent clients shall submit in writing to the student's law school the student's name and a statement that the student will be properly supervised under the provisions of this practice rule. The student's law school shall then certify the student's academic standing and file this certification with the Supreme Court for approval. Written notification of approval shall be provided to the law school. The certification shall remain in effect for twelve (12) months after the date filed. Law students may be

recertified for additional twelve-month periods. Certification shall terminate sooner than twelve (12) months upon the occurrences of the following events:

(1) Certification is withdrawn by the unit, agency, organization, or person by mailing notice to that effect to the law student, the law school, and the Supreme Court along with the reason(s) for such withdrawal;

(2) Certification is terminated by the Supreme Court by mailing notice to that effect to the law student, the law school, and the unit, agency, organization or person along with the reason(s) for such termination.

(3) Certification shall terminate upon the student being placed on academic probation;

(4) The student does not take the first bar examination following his or her graduation, upon which the certification will terminate on the first day of the exam;

(5) The student takes but fails the bar examination, upon which the certification will terminate upon notice to the dean and the law student of such failure; or

(6) The student takes and passes the bar examination and is admitted to the bar of the court.

1.04 Supervisory Attorney

The attorney who supervises a student shall:

(1) be a member of the bar of this court;

(2) assume personal professional responsibility for and supervision of the student's work;

(3) assist the student to the extent necessary;

(4) sign all pleadings;

(5) appear with the student in all trials;

(6) appear with the student at all other proceedings unless the attorney deems his or her personal appearance unnecessary to assure proper supervision. This authorization shall be made in writing and shall be available to the judge or other official conducting the proceedings upon request.

1.05 Miscellaneous

Nothing contained in this rule shall affect the existing rules of this court or the right of any person who is not admitted to practice law to do anything that he or she might lawfully do prior to the adoption of this rule. Any student enrolled in any school of law approved by the American Bar Association who otherwise meets the qualifications of this rule may petition this Court for the rights provided by this rule.

Rule 2. Clinical Student Practice

2.01 Representation

An eligible law student may, under the supervision of a member of the bar, perform all functions that an attorney may perform in representing and appearing on behalf of a client.

2.02 Eligible Law Students

An eligible law student is one who:

(1) is duly enrolled at the time of original certification in a school of law in Minnesota approved by the American Bar Association;

(2) has completed at the time of original certification legal studies equivalent to at least two semesters of full-time study;

(3) is enrolled at the time of original certification in a law school clinical program;

(4) has been certified by the dean or designee of the law school as being of good academic standing; and

(5) has been identified as a student and accepted by the client.

2.03 Certification

Certification of a student by the law school shall be filed with the Supreme Court for approval. Written notification of approval shall be provided the law school. The certification shall remain in effect for twelve (12) months after the date filed. Law students may be recertified for additional 12-month periods. Certification shall terminate sooner than twelve (12) months upon the occurrence of the following events:

(1) Certification is withdrawn by the dean by mailing notice to that effect to the law student and the Supreme Court along with the reason(s) for such withdrawal;

(2) Certification is terminated by the Supreme Court by mailing a notice to that effect to the law student and to the dean along with the reason(s) for such termination;

(3) The student does not take the first bar examination following his or her graduation, upon which the certification will terminate on the first day of the exam;

(4) The student takes but fails in the bar examination, upon which the certification will terminate upon notice to the dean and the law student of such failure; or

(5) The student takes and passes the bar examination and is admitted to the bar of this court.

2.04 Supervisory Attorney

The attorney who supervises a student shall:

(1) be a member of the bar of this court;

(2) assume personal professional responsibility for and supervision of the student's work;

(3) assist the student to the extent necessary;

(4) sign all pleadings;

(5) appear with the student in all trials;

(6) appear with the student at all other proceedings unless the attorney deems his or her personal appearance unnecessary to assure proper supervision. This authorization shall be made in writing and shall be available to the judge or other official conducting the proceedings upon request.

2.05 Miscellaneous

Nothing contained in this rule shall affect the existing rules of this court or the right of any person who is not admitted to practice law to do anything that he or she might lawfully do prior to the adoption of this rule. Any student enrolled in any school of law approved by the American Bar Association who otherwise meets the qualifications of this rule may petition this Court for the rights provided by this rule.

Rules of the Supreme Court for Registration of Attorneys

Adopted August 4, 1970
With amendments received through August 1, 2000

TABLE OF HEADNOTES

Rule

1. Promulgation of Rules
2. Registration Fee
3. Failure to Pay Fee
4. Notice
5. Reinstatement
6. Certificate
7. Special Fund
8. Nonresident Counsel
9. List of Practicing Attorneys

INDEX

TEXT OF RULES

Rule 1. Promulgation of Rules

Admission to the bar of the State of Minnesota, disciplinary proceedings, and continuing legal education for members of the legal profession shall be conducted according to rules promulgated by this court.

Rule 2. Registration Fee

A. In order to defray the expenses of examinations and investigation for admission to the bar and disciplinary proceedings, over and above the amount paid by applicants for such admission, with exception hereinafter enumerated, each attorney admitted to practice law in this state and those members of the judiciary who are required to be admitted to practice as a prerequisite to holding office shall hereinafter annually pay to the clerk of the appellate courts a registration fee in the sum of Two Hundred Dollars (\$200) or in such lesser sum as the court may annually hereafter determine.

Such fee, or portion thereof, shall be paid on or before the first day of January, April, July, or October of each year as requested by the clerk of the appellate courts.

All sums so received shall be allocated as follows:

- \$15 to the State Board of Law Examiners
- \$10 to the State Board of Continuing Legal Education
- \$100 to the Lawyers Professional Responsibility Board
- \$17 to the Minnesota Client Security Fund
- \$50 to the Legal Services Advisory Committee
- \$8 to the Lawyer Trust Account Board for a lawyers assistance program.

An attorney who certifies that his or her gross income from all sources, excluding the income of a spouse, is less than Twenty-five Thousand Dollars (\$25,000) per year, shall pay a registration fee in the sum of One Hundred Seventy-five Dollars (\$175). The allocation to the Legal Services Advisory Committee shall be reduced by Twenty-five Dollars (\$25).

B. The following attorneys and judges shall pay an annual registration fee of Ninety-four Dollars (\$94):

(a) Any attorney or judge whose permanent residence is outside the State of Minnesota and who does not practice law within the state;

(b) Any attorney while on duty in the armed forces of the United States.

The Ninety-four (\$94) so received shall be allocated as follows:

\$15 to the State Board of Law Examiners

\$7 to the State Board of Continuing Legal Education

\$14 to the Lawyers Professional Responsibility Board

\$50 to the Legal Services Advisory Committee

\$8 to the Lawyer Trust Account Board for a lawyers assistance program.

An attorney who certifies that his or her gross income from all sources, excluding the income of a spouse, is less than Twenty-five Thousand Dollars (\$25,000) per year, shall pay a registration fee in the sum of Sixty-nine Dollars (\$69). The allocation to the Legal Services Advisory Committee shall be reduced by Twenty-five Dollars (\$25).

C. Any attorney who has not been admitted to practice for more than three years shall pay an annual registration fee of Eighty-nine Dollars (\$89).

The Eighty-nine Dollars (\$89) so received shall be allocated as follows:

\$15 to the State Board of Law Examiners

\$10 to the State Board of Continuing Legal Education

\$14 to the Lawyers Professional Responsibility Board

\$17 to the Client Security Fund

\$25 to the Legal Services Advisory Committee

\$8 to the Lawyer Trust Account Board for a lawyers assistance program.

An attorney who certifies that his or her gross income from all sources, excluding the income of a spouse, is less than Twenty-five Thousand Dollars (\$25,000) per year, shall pay a registration fee in the sum of Seventy-six Dollars and fifty cents (\$76.50). The allocation to the Legal Services Advisory Committee shall be reduced by Twelve Dollars and fifty cents (\$12.50).

D. Any attorney who is retired from any gainful employment or permanently disabled, or who files annually with the clerk of the appellate courts an affidavit that he or she is so retired or disabled and not engaged in the practice of law, shall be placed in a fee-exempt category and shall remain in good standing. An attorney claiming retired or permanently disabled status who subsequently resumes active practice of law shall promptly file notice of such change of status with the clerk of the appellate courts and pay the annual registration fee.

E. Any judge who is retired from any gainful employment or permanently disabled, who no longer serves on the bench or practices law, and who files annually with the clerk of the appellate courts that he or she is so retired or disabled and not engaged in the practice of law, shall be placed in a fee-exempt category and shall remain in good standing. A judge claiming retired or permanently disabled status who subsequently resumes service on the bench or the active practice of law shall promptly file notice of such change of status with the clerk of the appellate courts and pay the annual registration fee.

(Amended August 12, 1980; amended May 18, 1982, effective for payments due after July 1, 1982; amended February 10, 1983; amended January 13, 1984; amended July 25, 1984, effective for payments due after October 1, 1984; amended April 7, 1987, effective for payments due after July 1, 1988; amended November 14, 1990, effective for payments due on or after July 1, 1991; amended April 15, 1992, effective for payments due between July 1, 1992 and June 30, 1993; effective for payments due on and after July 1, 1993; amended effective December 3, 1993; amended June 13, 1996, effective for licenses due for renewal on October 1, 1996, and for new licenses issued on or after October 1, 1996; amended February 5, 1997, effective for licenses due for renewal on July 1, 1997; and for new licenses issued on or after July 1, 1997; amended effective August 6, 1997, for licenses being renewed on or after August 6, 1997, and for new licenses issued on or after August 6, 1997, the allocation of fees set by Supreme Court Order C9-81-1206 shall continue in effect until June 30, 1998; allocation

continued until further order of the Court by Supreme Court order dated May 20, 1999; amended effective for registration fees due July 1, 2000.)

Rule 3. Failure to Pay Fee

Upon failure to pay such fee, the right to practice law in this state shall be automatically suspended, and no individual shall be authorized to practice law in this state or to in any manner hold himself out as qualified or authorized to practice law while in default in the payment of such registrations fee. Any individual who shall violate this rule shall be subject to all the penalties and remedies provided by law for the unauthorized practice of law in the State of Minnesota. It shall be the duty of each member of the judiciary to enjoin persons from appearing and practicing in his court whose failure to register has come to the attention of such court.

Rule 4. Notice

Annually one month prior to due date, the Clerk of the Appellate Courts shall mail to each individual then authorized to practice law, who has not paid such registration fee, at his last known address, a statement showing the amount of the registration fee required for the next ensuing year. Failure to receive such notice shall not excuse payment of such fee. Every attorney-at-law shall immediately notify the clerk of this court of any change of address.

Rule 5. Reinstatement

The right to practice law may be reinstated by the court after suspension upon application and upon the payment of all delinquent registration fees and additional late penalty sum of Fifty Dollars (\$50). This court may, in hardship cases, waive payment of delinquent fees and late penalties. All late penalty payments shall be allocated to an attorney registration account to defray the registration costs.

(Amended May 22, 1990, effective for registrations processed on or after July 1, 1990.)

Rule 6. Certificate

Upon payment of the registration fee, the Clerk of the Appellate Courts shall issue and deliver to the person paying the same a certificate in such form as may be provided by this court, showing that such individual is an attorney-at-law in good standing and authorized to practice in the State of Minnesota.

Rule 7. Special Fund

All money collected from applicants for admission to the bar or as an annual registration fee as provided herein shall be deposited by the clerk in a special fund, as desired by this court, and shall be disbursed therefrom only upon vouchers signed by a member of this court.

Rule 8. Nonresident Counsel

Nothing herein shall prevent any court in this state from granting special permission to nonresident counsel to appear and participate in a particular action or proceeding in association with an authorized attorney of this state.

Rule 9. List of Practicing Attorneys

A list of all those who are authorized to practice law in this state shall be available for inspection by the public, provided that names on the list shall not be used for mailing lists, for advertising or other nonofficial use except by a bona fide continuing legal education business and then only upon the grant of a written request and payment of the required fee.

(Added February 13, 1986.)

INDEX - REGISTRATION OF ATTORNEYS

ATTORNEYS

Admission to bar
 Application of rules, Rule 1
 Continuing legal education
 Application of rules, Rule 1
 Disciplinary proceedings
 Application of rules, Rule 1
 Nonresident attorneys
 Appearance with authorized resident attorney, Rule 8
 Notice received
 Registration fee statement, Rule 4
 Practice of law
 Enjoined
 Failure to pay registration fee, Rule 3
 List of practicing attorneys
 Inspection by public, Rule 9
 Use as mailing list, restrictions, Rule 9
 Nonresident attorneys, Rule 8
 Reinstatement after failure to pay registration fee
 Requirements, Rule 5
 Suspension
 Failure to pay registration fee, Rule 3
 Registration fees, see Fees under REGISTRATION OF ATTORNEYS

CLERKS OF COURT

Clerk of appellate courts
 Attorney registration fees, duties, Rule 4, Rule 6, Rule 7
 Certificates and certification
 Attorney licenses, issuance, Rule 6
 Notice given
 Attorneys, registration fee statement, Rule 4

INJUNCTIONS

Attorneys
 Practice of law enjoined, failure to pay registration fees
 Judges, duties, Rule 3

REGISTRATION OF ATTORNEYS

Fees
 Admission to bar, Rule 2
 Annual registration
 Attorneys, Rule 2
 Disabled attorneys, Rule 2
 Judges, Rule 2
 Notice requirements, Rule 4
 Reinstatement after failure to pay, Rule 5
 Retired attorneys, Rule 2
 Failure to pay
 Penalties, Rule 3
 License to practice law
 Issuance after payment of fees, clerk of appellate courts,
 duties, Rule 6
 List of practicing attorneys
 Rule governing, Rule 9
 Nonresident attorneys
 Appearance with authorized resident attorney,
 requirements, Rule 8
 Rules governing
 Generally, Rule 1 to Rule 9

SUPREME COURT

Funds and accounts
 Deposits to
 Attorney registration fees, clerk of appellate courts,
 duties, Rule 7
 Rulemaking
 Legal profession, rules governing, Rule 1

Rules of the Minnesota Board of Continuing Legal Education

Adopted April 17, 2000

Effective July 1, 2000.

TABLE OF HEADNOTES

1. Purpose
2. Definitions
3. State Board of Continuing Legal Education
 - A. Membership of the Board
 - B. Terms of Members
 - C. Chairperson and Vice Chair
 - D. Authority of the Board
 - E. Board Procedures
 - F. Confidentiality
 - G. Persons with Disabilities
 - H. Payment of Expenses
4. Applying for Credit
 - A. Course Approval and Fee Information
 - B. Professional Responsibility or Ethics: General Treatment
 - C. Sanctions for Failure to Include Ethics
 - D. Notice of Credit
5. Standards for Course Approval
 - A. General Standards
 - B. Standards for Course Approval for In-House Courses
6. Special Categories of Credit
 - A. Ethics Courses
 - B. Elimination of Bias Courses
7. Other Credit
 - A. Teaching Credit
 - B. Law Office Management
 - C. Courses at Universities
 - D. Retroactive Credit
8. Announcement of Approval
9. Affidavit of Continuing Legal Education
 - A. Contents of Affidavit
 - B. Timely Affidavit
 - C. Late Affidavit Fee
 - D. Notice of Noncompliance Fee
10. Determination and Review
 - A. Director's Determinations
 - B. Board Review
11. Notice of Noncompliance
 - A. Notice Required
 - B. Service of Notice
 - C. Contents of Notice
 - D. Effect of Notice
 - E. Board Hearing
 - F. Determination
 - G. Petition for Review
12. Restricted Status
 - A. Election of Restricted Status; Restrictions Imposed
 - B. Transfer from Restricted Status to Active Status
 - (1) Notice to Director and Fee
 - (2) Transfer Requirements
 - (a) Automatic transfer requirements

- (b) Discretionary transfer requirements
 - (c) Discretionary transfer criteria
 - (3) Report to the Board
 - (4) Failure to Abide by Transfer Conditions
 - (5) Appeal to Board
13. Transfer from Retired Status to Active Status

Appendix I

Appendix II

Compliance Instructions

INDEX

TEXT OF RULES

Rule 1. Purpose

The purpose of these Rules is to require that lawyers continue their legal education throughout the period of their active practice of law; to establish the minimum requirements for continuing legal education; to improve lawyers' knowledge of the law; and through continuing legal education courses, to address the special responsibilities that lawyers as officers of the court have to improve the quality of justice administered by the legal system and the quality of service rendered by the legal profession.

Rule 2. Definitions

In these Rules,

- A. "Approved Course" means a course approved by the Board.
- B. "Board" means the State Board of Continuing Legal Education.
- C. "Chairperson" means the chairperson of the Board.
- D. "Classroom setting" means a room, including an office, suitably appointed with chairs, writing surfaces, lecterns and other normal accoutrements of a teaching room, that is exclusively devoted to the educational activity being presented.
- E. "Director" means the Director of the Board.
- F. "Laboratory Setting" means a mock courtroom, law office, negotiation table, or other simulated setting in which demonstrations are given, roleplaying is carried out or lawyers' activities are taught by example or participation.
- G. "Participant" means a lawyer licensed in Minnesota attending an approved course and actively engaged in the subject matter being presented.
- H. "Course in ethics and professional responsibility" means a course or session within a course that deals with the Minnesota Rules of Professional Conduct, the ABA Model Rules of Professional Conduct, the rules of professional conduct or professional responsibility of other jurisdictions, or the opinions and case law arising from the application of any of the above-specified rules, including a course or session within a course that addresses in a specific way concepts such as professionalism, civility and ethical conduct in the practice of law and in the legal profession.
- I. "Course in the elimination of bias in the legal profession and in the practice of law" means a course directly related to the practice of law that is designed to educate attorneys to identify and eliminate from the legal profession and from the practice of law biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation.
- J. "Court" means the Supreme Court of the State of Minnesota.

K. "Restricted Status" means the status of a lawyer licensed in Minnesota who has voluntarily chosen not to comply with the educational and reporting requirements of these Rules. See Rule 12 for additional provisions.

L. "Involuntary Restricted Status" means the status of a lawyer licensed in Minnesota who is not in compliance with the educational and reporting requirements of these Rules and who has been placed involuntarily in that status by order of the Court. See Rule 12 for additional provisions.

M. An "in-house course" is one sponsored by a single private law firm, a single corporation or financial institution, or by a single federal, state or local governmental agency for lawyers who are members or employees of any of the above organizations.

N. For the purposes of Rule 6(B), an "established continuing legal education course sponsor" is a person or entity regularly retained by firms or organizations for the purpose of presenting continuing legal education programs, who is completely independent of the firm or organization for whose members the continuing legal education course is presented.

O. "Fee" means a check or money order made payable to the Minnesota State Board of Continuing Legal Education.

Rule 3. State Board of Continuing Legal Education

A. Membership of the Board. This court shall appoint twelve members and a chairperson. The membership of the CLE Board shall consist of:

- 3 members of the public;
 - 1 member who is a district court judge;
 - 6 lawyer members who are nominated by the Minnesota State Bar Association;
- and
- 3 lawyer members appointed by the Court.

B. Terms of Members. Appointments shall be for staggered 3-year terms, with no member serving more than two 3-year terms, and each member serving until a successor is appointed.

C. Officers of the Board.

(1) Chair. The chair of the Board shall be appointed by this Court for such time as it shall designate and shall serve at the pleasure of this Court.

(2) Vice Chair. A vice chair shall be designated by the Chair and shall maintain the minutes of meetings of the Board.

D. Authority of the Board. Subject to the general direction of the Court in all matters, the Board shall have supervisory authority over the administration of these Rules, shall accredit courses and programs which satisfy the educational requirements of these Rules, and shall have authority with respect to the following:

(1) Waivers and Extensions. Waiver of strict compliance with these Rules or extensions of time deadlines provided in these Rules may be made in cases of hardship or other compelling reasons.

(2) Supplemental Policies. The Board may make and adopt policies not inconsistent with these Rules governing the conduct of business and performance of its duties.

E. Board Procedures. Robert's Rules of Order shall govern the conduct of Board meetings where practicable.

F. Confidentiality. Unless otherwise directed by this Court, the files, records, and proceedings of the Board, as they may relate to or arise out of any failure of an active attorney to satisfy the continuing legal education requirements shall be deemed confidential and shall not be disclosed except in furtherance of its duties, or upon request of the attorney affected, or as they may be introduced in evidence or otherwise produced in proceedings in accordance with these Rules.

G. Persons with Disabilities. The Board shall administer these Rules in a manner consistent with state and federal laws prohibiting discrimination against persons with disabilities and to make reasonable modifications in any policies, practices, and procedures that might otherwise deny equal access to individuals with disabilities.

H. Payment of Expenses. The chairperson, the vice-chair and other members of the Board shall serve without compensation, but shall be paid reasonable and necessary expenses certified to have been incurred in the performance of their duties.

Rule 4. Applying for Credit

A. Course Approval and Fee Information. In applying for credit, a sponsoring agency or attorney shall submit to the Board an application for course approval (Appendix I, which is incorporated herein) to include the following:

- (1) Title of the program under consideration;
- (2) Location of the program;
- (3) Names and credentials of the speakers, including those of persons designated to act as moderators for videotape or satellite programs;
- (4) Type of presentation;
- (5) Agenda or course schedule showing beginning and ending times of each session;
- (6) Identification of type of credit for which approval is sought (standard CLE, ethics/professional responsibility CLE, elimination of bias CLE) for each segment of the course. No segment of any course shall be accredited in more than one category of credit;
- (7) A fee in the amount of \$35. This fee may be subject to waiver under the provisions of Rule 3D(1). A fee is not required when submitting an application for either of the following types of courses meeting Rule 4 and Rule 5 requirements:
 - (a) a previously accredited course which has been videotaped, and is replayed at a later date in its entirety;
 - (b) a course 60 minutes or less in duration.
- (8) Such other information as the Board may from time to time require.

B. Professional Responsibility or Ethics: General Treatment. Every CLE course approval form must include:

- (1) A description of the general treatment of professional responsibility and ethical considerations; or
- (2) An explanation of why professional responsibilities and ethical ethics are not included.

C. Sanctions for Failure to Include Ethics. If, in the opinion of the Board, the general treatment of professional responsibility or legal ethics topics within courses accredited as standard continuing legal education is inadequate without satisfactory explanation, the Board may refuse to grant full credit for all hours in attendance, impose a deduction from credit hours which would otherwise be granted, and in the case of persistent refusal to cover these topics, refuse to grant further credit for courses offered by the sponsor.

D. Notice of Credit. The Board shall inform the sponsor or applicant of the number and type of credit hours granted or denied.

Rule 5. Standards for Course Approval

A. General Standards. A course must meet the following standards before approval is granted.

- (1) The course shall have significant intellectual or practical content.

(2) The course shall deal primarily with matter directly related to the practice of law or to the professional responsibility or ethical obligations of participants or to the elimination of bias in the legal profession and in the practice of law.

(3) The course shall be taught by faculty members qualified by practical or academic experience to teach the specified subject matter. Legal subjects should be taught by lawyers.

(4) Any written materials should be thorough, high quality, readable, carefully prepared, and distributed to all participants at or before the time the course is offered.

(5) The course shall be presented and attended in a suitable classroom or laboratory setting. Videotape, motion picture, simultaneous broadcast, teleconference, or audiotape presentations may be used provided that a faculty person is in attendance at all presentations, either in person or through live transmission allowing all seminar participants to hear and participate in the question and answer session. Subject to the exception of paragraph (11) below, no program will be approved that involves solely TV or videotape viewing in the home or office, correspondence work or self-study, including on-line self-study.

(6) Credit will not normally be given for speeches at luncheons or banquets.

(7) A list of all participants shall be maintained by the sponsoring agency and transmitted to the Board upon request, following the presentation of the course.

(8) Credit shall be awarded on the basis of one hour for each 60 minutes actually spent in attendance at an approved course.

(9) A lawyer shall not receive credit for any course attended before being admitted to practice law in Minnesota, but one so admitted may receive credit of one hour for each 60 minutes actually spent in attendance, for attending for credit or as an auditor a regular course offered by a law school approved by the American Bar Association.

(10) Notwithstanding the provisions of paragraph (9) above, a person who takes approved courses or teaches in an approved course after sitting for the Minnesota Bar Examination, but before admission to practice, may claim credit for the courses taken or the teaching done, if he or she passes that bar examination.

(11) Lawyers residing or working outside of the State of Minnesota during the CLE reporting period who, because of non-residence are unable in good faith to attend courses accredited as "elimination of bias" as defined in these rules, may receive up to 2 hours of credit in fulfillment of the elimination of bias requirement by viewing a videotaped course or courses that otherwise meet the requirements of these rules. If a lawyer views a videotaped elimination of bias course not previously approved for credit under these rules, the lawyer may seek approval by completing and submitting the Course Approval Form in Appendix II.

B. Standards for Course Approval for In-House Courses

(1) An in-house course as defined in Rule 2 (M) will be approved if:

(a) The requirements of Rule 5 (A) and other applicable board rules are met;

(b) 25% of the hours of approved instruction are taught by instructors having no continuing relationship or employment with the sponsoring firm, department, financial institution or agency;

(c) Notice of the course is given to enough outside lawyers so that the audience can potentially be composed of at least 25% participants who are not lawyers working in or for the sponsoring firm, department, institution or agency; and

(d) Approval is sought prior to its presentation.

(2) An in-house course, as defined in Rule 2, that is presented and controlled by an established continuing legal education course sponsor as defined in Rule 2N, may be approved for credit, notwithstanding the fact that the course does not comply with requirements of Rule 5B(1) (b) and (c) above.

(3) An in-house course as defined in Rule 2M shall not be approved for credit if it is presented primarily for clients or clients' counsel.

Rule 6. Special Categories of Credit

A. Ethics Courses. In order to be approved as ethics or professional responsibility under these Rules, courses or sessions within courses must be at least 30 minutes in length and must be separately identified as ethics or professional responsibility on the course agenda and on the Course Approval Form Appendix I.

B. Elimination of Bias Courses. Courses or sessions within courses accredited as elimination of bias:

- (1) Must be at least 60 minutes in length;
- (2) Must be identified on the Course Approval Form as fulfilling the elimination of bias requirement and be accompanied by a narrative required by Appendix I of these Rules;
- (3) Must focus on issues in the legal profession and in the practice of law and not on issues of bias in society in general; and
- (4) Must not include courses on the substantive law of illegal discrimination unless such courses meet one or more of the Goals for the Elimination of Bias as set forth in the Course Approval Form at Appendix I.

Rule 7. Other Credit

A. Teaching Credit. Credit for teaching in an approved course shall be awarded to presenting faculty on the basis of one credit for each 60 minutes spent by the faculty preparing the presentation and materials for the course. No credit shall be awarded for teaching directed primarily to persons preparing for admission to practice law. A lawyer seeking credit for teaching and preparation for teaching shall submit all information called for on the Affidavit of CLE Compliance at Appendix II.

B. Law Office Management. A lawyer may receive credit for attendance at a course on law office management to a maximum of six credits per reporting period. The course must be submitted for review pursuant to Rule 5. Law office management courses that specifically address elimination of bias in the law office or in the practice of law may be accredited instead as elimination of bias CLE and when so designated are not subject to the 6-hour maximum on law office management courses.

C. Courses at Universities. Courses that are part of a regular curriculum at a college or university, other than a law school, may be approved for a maximum of 15 hours per course when the lawyer requesting approval submits evidence supporting the conclusion that the course meets the Rule 5A(1) through (5) criteria and that it is directly related to the requesting lawyer's practice of law.

D. Retroactive Credit. A lawyer, or a course sponsor, may seek retroactive approval of courses by submitting the necessary information on the Course Approval form.

Rule 8. Announcement of Approval

Any person may announce, as to a course that has been given approval that: "This course has been approved by the Minnesota Board of Continuing Legal Education for hours in the following category or categories of credit:

- standard continuing legal education;
- ethics or professional responsibility continuing legal education; or
- elimination of bias continuing legal education."

Rule 9. Affidavit of Continuing Education

A. Contents of Affidavit. To maintain active status, a lawyer must submit a written affidavit to the Board on the affidavit form published as Appendix II and incorporated herein, setting forth all information called for and showing that the lawyer has completed a minimum of 45 hours of course work either as a participant or a presenter in approved continuing legal education courses, including:

(1) no fewer than three (3) hours of courses on ethics and professional responsibility education; and

(2) no fewer than two (2) hours of courses in the elimination of bias in the legal profession and in the practice of law.

B. Timely Affidavit. The affidavit is timely if filed not later than 60 days after the close of the 3-year period specified by the Office of Attorney Registration as the lawyer's continuing legal education reporting period.

C. Late Affidavit Fee. The lawyer who submits an Affidavit of CLE Compliance after the 60-day filing period, but before issuance of a Notice of Noncompliance, shall submit along with the late affidavit a late filing fee in the amount of \$50.00. This fee is payable notwithstanding the Board's grant of an extension of time to file. Additional late fees will not be charged for late affidavits filed within a single reporting period.

D. Notice of Noncompliance Fee. The lawyer who submits an affidavit after the issuance of a Notice of Noncompliance, but prior to the issuance of a Court order placing the lawyer on involuntary restricted status, shall submit along with the affidavit a fee in the amount of \$100.

Rule 10. Director's Determinations and Board Review

A. Director's Determinations. The Director shall have the following authority and responsibility:

(1) To respond in writing to written requests for approval of courses giving reasons for the determination;

(2) To grant credit to lawyers for attending or teaching in approved courses;

(3) To grant or deny requests for transfer, waiver, extension of time deadlines or interpretation of these Rules; and

(4) To inform the Board about determinations made since the Board's last meeting, together with observations and comments relating to matters under the Board's jurisdiction.

B. Board Review. A lawyer or sponsoring agency affected by an adverse determination of the Director may request Board review of the determination, and may present information to the Board in writing and in person. The Board may take such action as it deems appropriate and shall advise the lawyer or sponsoring agency of its determination.

Rule 11. Notice of Noncompliance

A. Notice Required. The Director shall send a notice of noncompliance to any lawyer who:

(1) Fails to meet the requirements of these Rules; and

(2) Fails to request and obtain an extension of time in which to file a report as required by these Rules.

B. Service of Notice. The notice shall be sent by regular mail to the lawyer's last known address.

C. Contents of Notice. The notice shall state the nature of the noncompliance and shall inform the lawyer of the right to request a hearing within 30 days of the mailing of the notice, the right to be represented by counsel, and the right to present witnesses and evidence.

D. Effect of Notice. If no hearing is requested, the Director's determination of noncompliance shall become final and shall be reported to the Court with the recommendation that the lawyer be placed on CLE involuntary restricted status.

E. Board Hearing. If a hearing is requested, the following will apply:

(1) The Board may employ special counsel;

(2) The Chairperson shall preside at the hearing, which may be held before the entire Board or a committee appointed by the Chairperson, and shall make necessary rulings; and

(3) The hearing shall be recorded and a transcript shall be provided to the lawyer at a reasonable cost.

F. Determination. Following the hearing, the Board shall issue a written decision. If the lawyer is determined to be in noncompliance with these Rules, the Board may recommend to the Supreme Court that the lawyer's license be placed on CLE involuntary restricted status or take such action as is appropriate.

G. Petition for Review. A lawyer who is adversely affected by the decision of the Board may appeal to the Court by filing a petition for review with the Clerk of Appellate Courts within 20 days of receipt by the lawyer of the decision, together with proof of service of the petition on the Director. The petition shall state briefly the facts that form the basis for the complaint and the lawyer's reasons for believing the Court should review the decision. Within 20 days of service of the petition, the Board shall serve and file a response to the petition and a copy of the final decision of the Board. Thereupon, the Court shall give such direction, hold such hearings and make such order as it may in its discretion deem appropriate.

Rule 12. Restricted Status

A. Election of Restricted Status; Restrictions Imposed. A lawyer duly admitted to practice in this state may elect CLE restricted status as defined in Rule 2(K) by sending written notice of such election to the Director. A lawyer on restricted CLE status shall not be required to satisfy the educational and reporting requirements provided by these rules and shall be subject to the following provisions and restrictions:

(1) A lawyer on restricted status may not engage in the practice of law or represent any person or entity in any legal matter or proceedings within the State of Minnesota other than himself or herself.

(2) The name of a lawyer on restricted status may not appear on law firm letterhead without a qualification that the lawyer's Minnesota license is restricted. A law firm name may continue to include the lawyer's name if the name was included prior to the lawyer's placement on restricted status. A restricted lawyer may not be listed "of counsel" or otherwise be represented to clients or others as being able to undertake legal business.

(3) A restricted lawyer may not have a financial interest in a law firm that is a professional corporation.

(4) A referee or judicial officer of any court of record of the State of Minnesota or lawyer employed and serving as attorney or legal counsel for any employer, including any governmental unit of the State of Minnesota, is not eligible to apply for restricted status.

(5) A restricted lawyer shall be issued a wallet license that is marked "CLER" ("continuing legal education restricted") in place of the reporting category.

B. Transfer from Restricted Status to Active Status.

(1) **Notice to Director and Fee.** Unless otherwise ordered by this Court, a lawyer on restricted CLE status who desires to resume active CLE status shall notify the Director in writing of the lawyer's intention to resume active CLE status, and shall submit a transfer fee of \$125.

(2) **Transfer Requirements.** A lawyer on restricted CLE status who submits a notice and fee for transfer to active CLE status shall be transferred upon the Director's determination that the lawyer has fulfilled the requirements of (a) or (b) below:

(a) **Automatic transfer requirements.** The lawyer has completed the number of CLE hours that the lawyer would have had to complete to meet reporting

requirements and to be current on a proportional basis had the lawyer not been on restricted status, or

(b) Discretionary transfer requirements. The lawyer has completed such lesser requirements as the Director determines are adequate provided that the number of hours completed totals no fewer than 45 hours during the three years immediately preceding transfer. The Director will specify no more than 90 hours. Determinations will be made subject to the criteria set forth in paragraph (c) below.

(c) Discretionary transfer criteria. The Director may transfer a lawyer to active status when the lawyer has fulfilled appropriate CLE conditions precedent or agreed to fulfill appropriate CLE conditions subsequent as determined by the Director. In making discretionary transfer decisions, the Director will take the following into consideration:

- i. The number of CLE hours the lawyer has taken in the past;
- ii. The lawyer's other educational activity and its nature;
- iii. The lawyer's practice of law in another jurisdiction;
- iv. The lawyer's law-related work other than the practice of law and its nature;
- v. Whether the lawyer acted reasonably in not anticipating the need to take the appropriate number of CLE hours before being transferred from active status; and
- vi. Whether the lawyer has demonstrated circumstances of hardship or other compelling reasons that show the lawyer should be transferred to active status temporarily before completing the appropriate number of CLE hours.

(3) Report to the Board. The Director shall report to the Board at its next meeting the terms and conditions upon which transfers to active status were made.

(4) Failure to Abide by Transfer Conditions. The lawyer who fails to comply with the conditions of transfer shall be restored to restricted status upon notice from the Director sent by regular mail to the lawyer's last known address.

(5) Appeal to Board. Upon written request from the lawyer, the Board shall review the Director's determination of transfer requirements and notify the lawyer in writing regarding the outcome of that review.

Rule 13. Transfer from Retired Status to Active Status

A lawyer on retired status who seeks to transfer to active status is subject to the provisions of Rule 12 and shall notify the Office of Attorney Registration of his/her intention to transfer to active status.

Appendix I

MN STATE BOARD OF CONTINUING LEGAL EDUCATION, 25 CONSTITUTION AVENUE, SUITE 110, ST. PAUL, MN 55155

COURSE APPROVAL FORM

Instructions: ENCLOSE \$35.00 APPLICATION FEE (RULE 4A(7)). Please type. Leave no blanks. Incomplete forms will be returned to you. In completing this form, please refer to the Rules of the Board of Continuing Legal Education published in the Rules of Court volume of the Minnesota Statutes. A lawyer or sponsoring agency adversely affected by the determination of the Director may request review by the Board.*

I. SPONSOR INFORMATION

Name

Street Address

City

State

Zip Code

Contact Person

Telephone (area code)

Submitted by: Name

_____ course sponsor _____ course participant (check one)

Expected Audience or Marketing Target:

A list of Minnesota participants must be maintained by the sponsor and made available to the Board upon request.

II. COURSE DATA

Title

Date

Location

Check those which apply:

_____ live lecture

_____ in house program (see Rule 5B)

_____ study tour

_____ video-tape/film (must have live moderator)

_____ demonstration, role play, mock trial

_____ live satellite broadcast (must have live moderator)

III. FACULTY DATA: Indicate where in the brochure this information is found or attach separate sheet.

IV. SESSION SCHEDULE AND AGENDA: Provide a detailed agenda or information on an attached sheet showing a complete breakdown of the program, marking the segments for which credit is requested. For each segment, indicate the beginning and ending times, the faculty, and sufficient detail about the content of the segment in order to make an accreditation decision under Board Rules. Course segments can be accredited as standard CLE, or ethics CLE or elimination of bias CLE. Indicate for each segment the type of CLE credit for which you are applying. Attach a copy of the promotional brochure, if any, and describe the materials to be distributed to participants (a copy may be submitted in lieu of a description).

V. ETHICS AND PROFESSIONAL RESPONSIBILITY CONTENT: Ethics or professional responsibility must be a component of every approved standard CLE course in Minnesota or an explanation must be provided as to why ethics is not covered. In addition, courses may also be accredited as "Ethics CLE" or "Elimination of Bias CLE." See Rules 6A and 6B of the Rules of the Minnesota Board of CLE. In order to qualify for ethics CLE credit, an ethics course or segment of a course must be at least 30 minutes in length.

Check below the treatment of ethics or professional responsibility content in the program:

- ☐ A portion of the program 30 minutes or more in length addresses ethics or professional responsibility and is marked as "Ethics" on the attached program agenda.
- ☐ Ethics or professional responsibility concerns are addressed throughout the program but no distinct segment is 30 minutes or more in length.
- ☐ No portion of the program addressed ethics or professional responsibility. Attached is an explanation of why ethics or professional responsibility content is not present in this program.

VI. ELIMINATION OF BIAS EDUCATION: Please check here to indicate whether you are requesting Elimination of Bias credit for this program:

- ☐ Elimination of Bias credit is sought. See attached narrative.
- ☐ No credit for Elimination of Bias is sought.

Minnesota CLE Rule 6B describes course requirements for CLE on the "elimination of bias in the legal profession and in the practice of law." In order to be afforded "elimination of bias" credit, such courses or segments of courses must be at least 60 minutes in length. If elimination of bias credit is sought for some portion of this course, please do the following:

1. Review the "elimination of bias" goals listed below;
2. Mark the segment or segments on the agenda which the sponsor believes fulfill these requirements;
3. Attach a brief written narrative describing how the course segment or segments meet one or more of the "Learning Goals for Minnesota Elimination of Bias Courses" listed below.

Please note that courses or segments of courses may address ethics and elimination of bias topics. A sponsor may seek credit in one category or the other, but will not be accredited in both categories simultaneously. The Board will determine in which category credit will be granted, based upon the course description and the sponsor's narrative.

LEARNING GOALS FOR MINNESOTA ELIMINATION OF BIAS COURSES

Courses approved as "elimination of bias" must be at least 60 continuous minutes in duration, must be directly related to the practice of law, must meet all other requirements of Rule 5 of the Rules of the CLE Board and must be designed to meet one or more of the following goals:

1. to educate attorneys about the elimination of bias or prejudice in the legal profession, in the practice of law, and/or in the administration of justice;
2. to educate attorneys regarding barriers to hiring, retention, promotion, professional development and full participation of lawyers of color, women, and those persons referenced in the "elimination of bias" definition (L) of the Rules of the CLE Board, both in the public and private sector of the legal profession and in the practice of law;
3. to educate attorneys about the problems identified in the Supreme Court's Race Bias and Gender Fairness Task Force Reports, as well as in other studies, reports or treatises which describe bias and prejudice in the legal profession, in the practice of law, and/or in the administration of justice.

*Until credit is granted by the Minnesota Board of Continuing Legal Education, sponsors are asked to advertise credit as "applied for."

Appendix II
MINNESOTA STATE BOARD OF CONTINUING LEGAL EDUCATION
Minnesota Judicial Center, 25 Constitution Ave, Suite 110, St. Paul, Minnesota 55155
AFFIDAVIT OF CLE COMPLIANCE

License Number: _____ Name: _____
CLE Category: _____ Mailing Address: _____
Period Covered: _____ Date of this Report: _____
I swear that the information below is an accurate and complete record of my attendance.

Attorney Signature _____

ATTENDANCE INFORMATION

SPONSORING AGENCY	COURSE TITLE	COURSE DATES	HOURS OF STANDARD CLE	HOURS OF ETHICS**	HOURS OF ELIMINATION OF BIAS**
a.					
b.					
c.					
d.					

Please retain a copy of this form for your records.

(USE ADDITIONAL SHEETS IF NECESSARY)

HOURS OF PREPARATION AND TEACHING INFORMATION*

SPONSORING AGENCY	COURSE TITLE	COURSE DATES	HOURS OF STANDARD CLE	HOURS OF ETHICS**	HOURS OF ELIMINATION OF BIAS**
a.					
b.					

*Please indicate teaching and preparation time separately.

**At least 3 hours of CLE in Ethics and at least 2 hours of CLE in the Elimination of Bias are required every 3 years. Hours for all categories of credit (the above as well as standard CLE) must total 45 hours in a 3-year reporting period. Courses accredited as law office management must not exceed 6 hours per 3-year period. Course segments will not be accredited as both ethics and elimination of bias.

COMPLIANCE INSTRUCTIONS

REQUIREMENTS: The CLE Rules require that each attorney holding an active license complete a minimum of 45 credit hours including at least 3 ethics credits and 2 elimination of bias credits every three years. A reporting category, which appears on the face of the wallet license, is assigned to each attorney.

CLE 1 reports attendance from July 1, 1997 to June 30, 2000;

CLE 2 reports attendance from July 1, 1998 to June 30, 2001;

CLE 3 reports attendance from July 1, 1999 to June 30, 2002.

The credits must be taken prior to June 30 in the reporting year. There is no carry-over of credits from one reporting period to the next.

DEADLINES: Courses must be taken prior to June 30 of the reporting year. An attorney then has 60 days from that date to file an affidavit of attendance with the Board. Affidavits received after the filing deadline are subject to a \$50.00 late filing fee.

SANCTIONS: Failure to comply with the CLE reporting requirement will result in the issuance of a Notice of Noncompliance. Affidavits received after the issuance of a Notice of Noncompliance must be accompanied by a \$100.00 late filing fee. Continued noncompliance will result in the attorney being placed on involuntary restricted status by court order.

RECORDKEEPING: It is the responsibility of the attorney to maintain records of courses taken and to file promptly with the Board. Third-party attestations from course sponsors are not acceptable. The Board has no information on an attorney's attendance until the affidavit of the attorney is filed.

The Board office maintains course files by sponsor. A course cannot be identified unless the sponsor is correctly and completely listed.

ELIGIBLE COURSES: An attorney will not receive credit for attending a course until the course has been approved under Minnesota rules. Courses approved by other CLE states are not necessarily acceptable in Minnesota. In addition to the criteria listed in Board Rule 5 for course approval, eligible courses should comply with Rule 4 requiring ethical content. The Course Approval Form guides the sponsor or attorney in providing the information necessary for review.

RESTRICTED STATUS: An attorney may be excused from the CLE requirement by electing voluntary restricted status under Rule 12.

INFORMATION: Information on the credits allowed for a course should be obtained from the course sponsor. Other information and additional forms may be obtained upon request from the office of the Board of Continuing Legal Education.

INSTRUCTIONS FOR CLAIMING CREDIT FOR TEACHING

Rule 7(A). Teaching Credit

Teaching Credit. Credit for teaching in an approved course shall be awarded to presenting faculty on the basis of one credit for each 60 minutes spent by the faculty preparing the presentation and materials for the course. No credit shall be awarded for teaching directed primarily to persons preparing for admission to practice law. A lawyer seeking credit for teaching and preparation for teaching shall submit all information called for on the Affidavit of CLE Compliance at Appendix II.

An attorney who makes a one-hour presentation and spends five hours in preparing is entitled to claim a total of six hours. If he/she also sits as a member of the audience for some portion of the course being presented by other speakers, he/she can claim credit for attending that part of the course. Course information should be reported on the form in the appropriate sections.

Credit for teaching/preparation is only available when the lawyer actually teaches in an approved course. A lawyer who prepares materials which are distributed at the course but who does not appear on the platform as a speaker can claim no credit for his/her scholarly efforts, just as he/she could claim no credit for writing a law review article.

A lawyer who is in charge of a course normally spends administrative time persuading speakers to participate, encouraging them to complete their written materials and conferring with speakers about the allocation of responsibility for subject areas. Time so spent cannot be included in teaching/preparation time.

INDEX - CONTINUING LEGAL EDUCATION

AFFIDAVITS

- Affidavits of continuing legal education
 - Contents, requirements, Rule 9.A
 - Extension of time to file, late fee, Rule 9.C
 - Timeliness
 - Notice of noncompliance fee, Rule 9.D
 - Requirements, Rule 9.B

ATTORNEY REGISTRATION OFFICE

- Notice received
 - Transfer from retired to active CLE status, Rule 13

ATTORNEYS

- Affidavits
 - Continuing legal education, See Affidavits of continuing legal education under AFFIDAVITS
- Appointment
 - Continuing legal education board, Rule 3.A
- CLE status
 - Elected restricted status
 - Restrictions, Rule 12.A
 - Transfer to active CLE status, Rule 12.B
 - Involuntary restricted status
 - Noncompliance with rules, Rule 11.D, Rule 11.E
 - Retired status
 - Transfer to active CLE status, Rule 13
- Continuing legal education
 - Credits awarded
 - Courses at universities, limitations, Rule 7.C
 - Law office management, Rule 7.B
 - Requirements, generally, Rule 5.A
 - Retroactive credits, Rule 7.D
 - Teaching credits, Rule 7.A
 - Noncompliance with requirements, See Noncompliance with requirements under CONTINUING LEGAL EDUCATION
 - Nonresident attorneys, Rule 5.A
 - Requirements, generally, Rule 1 to Rule 13
- Notice given
 - Transfer from retired to active CLE status, Rule 13
- Petitions by
 - Board determinations
 - Noncompliance with rules, Rule 11.G
 - Transfer requirements, transfer from restricted to active CLE status, Rule 12.B
- Representation
 - Continuing legal education board, Rule 3.A
- Requests by
 - Hearings
 - Noncompliance with rules, Rule 11.E
- Special counsel
 - Continuing legal education board
 - Noncompliance hearings, Rule 11.E

CONTINUING LEGAL EDUCATION

- CLE status
 - Active status
 - Transfer to, Rule 12.B, Rule 13
 - Restricted status
 - Election, restrictions imposed, Rule 12.A
 - Involuntary restricted status, Rule 11.D
 - Transfer to active status, Rule 12.B
 - Retired status
 - Transfer from, requirements, Rule 13
- Courses and programs
 - Accreditation
 - Application for, requirements, Rule 4.A
 - Approval, announcement, requirements, Rule 8
 - Continuing legal education board, duties, Rule 3.D
 - Forms (documents), See FORMS (DOCUMENTS)
 - Special categories of credit, Rule 6.A, Rule 6.B
 - Elimination of bias
 - Length, requirements, Rule 6.B
 - Requirements, generally, Rule 6.B
 - Separate identification, requirements, Rule 6.B
 - Ethics or professional responsibility
 - Failure to include, sanctions, Rule 4.C

CONTINUING LEGAL EDUCATION (Cont'd)

- Courses and programs (Cont'd)
 - Ethics or professional responsibility (Cont'd)
 - General treatment, Rule 4.B
 - Length, requirements, Rule 6.A
 - Separate identification, requirements, Rule 6.A
 - In-house courses
 - Requirements for approval, Rule 5.B
 - Professional responsibility or ethics
 - Failure to include, sanctions, Rule 4.C
 - General treatment, Rule 4.B
 - Length, requirements, Rule 6.A
 - Separate identification, requirements, Rule 6.A
 - Self-study courses, prohibited, generally, Rule 5.A
 - Sponsoring agencies
 - Course approval, announcement, requirements, Rule 8
 - Course approval, seeking, duties, Rule 4.A
 - List of participants, requirements, Rule 5.A
- Established continuing legal education course sponsors
 - Defined, Rule 2.N
- Notice received
 - Course credit, Rule 4.D
- Noncompliance with requirements
 - Notice of noncompliance
 - Contents, requirements, Rule 11.C
 - Effect, Rule 11.D
 - Hearings, See Hearings under CONTINUING LEGAL EDUCATION BOARD
 - Requirements, Rule 11.A
 - Service of, Rule 11.B
- Rules governing
 - Definitions, See DEFINITIONS
 - Purpose, Rule 1

CONTINUING LEGAL EDUCATION BOARD

- Approvals by
 - Continuing legal education courses and programs
 - Courses at universities, limitations, Rule 7.C
 - Elimination of bias courses, Rule 6.B
 - Ethics courses, Rule 6.A
 - General standards, Rule 5.A
 - In-house courses, Rule 5.B
 - Law office management, Rule 7.B
 - Retroactive credit, Rule 7.D
 - Teaching credit, Rule 7.A
 - Authority, generally, Rule 3.D
- Chairperson
 - Appointment, Rule 3.C
 - Hearings, duties, Rule 11.E
- Compliance with rules of continuing legal education
 - Policies, adoption, Rule 3.D
 - Waivers and extensions
 - Affidavits of continuing legal education, Rule 9.C
 - Authority to grant, Rule 3.D
- Determinations by
 - Noncompliance with continuing legal education rules
 - Appeals from, Rule 11.G
 - Effect, Rule 11.F
- Director
 - Determinations by
 - Adverse determinations, Rule 10.B
 - Generally, Rule 10.A
 - Transfer of attorneys from restricted to active CLE status, Rule 12.B
 - Duties, generally, Rule 10.A
 - Notice given
 - Notice of noncompliance, Rule 11.A
 - Reports given
 - Transfer of attorneys from restricted to active CLE status, Rule 12.B
- Fees
 - Affidavit of continuing legal education
 - Late fee, Rule 9.C
 - Notice of noncompliance fee, Rule 9.D
 - Transfer from restricted to active CLE status, Rule 12.B

CONTINUING LEGAL EDUCATION BOARD (Cont'd)**Hearings**

- Noncompliance with continuing legal education rules
- Record of proceedings, requirements, Rule 11.E
- Requirements, generally, Rule 11.E

Meetings

- Record of proceedings, requirements, Rule 3.C

Members

- Compensation and salaries
- Prohibited, Rule 3.H
- Expenses
- Payment, requirements, Rule 3.H
- Number, Rule 3.A
- Term, Rule 3.B

Notice given

- Continuing legal education sponsoring agencies
- Notice of course credit, Rule 4.D

Officers

- Appointment, Rule 3.C

Petitions to

- Transfer requirements
- Transfer from restricted to active CLE status, Rule 12.B

Procedures

- Robert's Rules of Order, use, Rule 3.E

Proceedings

- Confidentiality
- Requirements, generally, Rule 3.F
- Equal access for disabled persons
- Requirements, generally, Rule 3.G

Review by

- Determinations by director
- Adverse determinations, Rule 10.B
- Transfer requirements, transfer from restricted to active CLE status, Rule 12.B

Rules governing

- Definitions, See DEFINITIONS
- Generally, Rule 1 to Rule 13
- Purpose, Rule 1

Vice chairperson

- Appointment, Rule 3.C
- Duties, Rule 3.C

DEFINITIONS

- Approved course, Rule 2.A
- Board, Rule 2.B
- Chairperson, Rule 2.C
- Classroom setting, Rule 2.D

DEFINITIONS (Cont'd)

- Course in elimination of bias in the legal profession and in the practice of law, Rule 2.I
- Course in ethics and professional responsibility, Rule 2.H
- Court, Rule 2.J
- Director, Rule 2.E
- Established continuing legal education course sponsor, Rule 2.N
- Fee, Rule 2.O
- In-house course, Rule 2.M
- Involuntary restricted status, Rule 2.L
- Laboratory setting, Rule 2.F
- Participant, Rule 2.G
- Restricted status, Rule 2.K

DISTRICT COURT JUDGES**Representation**

- Continuing legal education board, Rule 3.A

FORMS (DOCUMENTS)

- Continuing legal education
- Affidavit of CLE compliance, Appendix II
- Course approval
- Application, contents, requirements, Rule 4.A, Rule 4.B
- Form, Appendix I

MAIL AND MAILING

- Continuing legal education
- Notice of noncompliance, Rule 11.B

SERVICE OF PROCESS

- Continuing legal education
- Notice of noncompliance, Rule 11.B

STATE BAR ASSOCIATION:

- Appointments by
- Attorneys
- Continuing legal education board, Rule 3.A

SUPREME COURT

- Appointments by
- Continuing legal education board
- Chairperson, Rule 3.C
- Members, Rule 3.A

Petitions to

- Continuing legal education, noncompliance with rules, determination by board, Rule 11.G

Review by

- Continuing legal education, noncompliance with rules, determination by board, Rule 11.G

Rules of Lawyer Trust Account Board

Adopted Effective July 1, 1983
With amendments received through August 1, 2000

TABLE OF HEADNOTES

Rule

1. Composition
2. Powers and duties
3. Officers
4. Director
5. Compensation and Expenses
6. Disposition of Funds Upon Dissolution
7. Supplemental Rules

MEMORANDUM OPINION

TEXT OF RULES

Rule 1. Composition

The Lawyer Trust Account Board shall consist of six lawyers having their principal offices in this state, three of whom the Minnesota State Bar Association may nominate, and three public members 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 one-third of all terms expire each February 1. No person may serve more than two three-year terms, in addition to any initial shorter term.

Rule 2. Powers and Duties

(a) **General.** The Board shall have general supervisory authority over the administration of these Rules.

(b) **Receipt and investment of funds.** The Board shall receive funds from lawyers' interest bearing trust accounts and make appropriate temporary investments of such funds pending disbursement of them.

(c) **Disbursement of funds.** The Board shall, by grants and appropriations it deems appropriate, disburse funds for the tax exempt public purposes which the Board may prescribe from time to time consistent with Internal Revenue Code Regulations and rulings, including those under Section 501(c)(3).

(d) **Records and reports.** The Board shall maintain adequate books and records reflecting all transactions, shall report quarterly to the Court, and shall report annually to the Minnesota State Bar Association and to the public.

Rule 3. Officers

(a) **Chairperson.** The Chairperson of the Board shall be appointed by this Court from the members of the Board for such time as the Court designates and shall serve at the pleasure of the Court.

(b) **Other officers.** The Board may elect other officers as it deems appropriate and may specify their duties.

(Amended May 17, 1988.)

Rule 4. Director

(a) **Appointment.** The Board may appoint an Executive Director to serve on a full or part time basis at the pleasure of the Board and to be paid such compensation as the Board shall fix.

(b) **Duties.** The Director shall be responsible and accountable to the Board for the proper administration of these Rules.

(c) **Services.** The Director may employ persons or contract for services as the Board may approve.

Rule 5. Compensation and Expenses

The Chairperson and other members of the Board shall serve without compensation but shall be paid their reasonable and necessary expenses incurred in the performance of their duties. All expenses of the operation of the Board shall be paid from funds the Board receives from lawyers' interest bearing trust accounts.

Rule 6. Disposition of Funds Upon Dissolution

If the Lawyer Trust Account Board is discontinued, any funds then on hand shall be transferred to its successor state agency or organization qualifying under Internal Revenue Code section 501(c)(3), if any, for distribution for the purposes specified under Rule 2 or, if there is no successor, to the general fund of the State of Minnesota.

Rule 7. Supplemental Rules

The Board may make and adopt rules not inconsistent with these Rules to govern the conduct of its business and performance of its duties.

IN THE MATTER OF THE PETITION OF THE MINNESOTA STATE BAR ASSOCIATION, A CORPORATION, FOR AMENDMENT OF DR 9-102 AND 9-103, AND TO ENACT A NEW DR 9-104 OF THE CODE OF PROFESSIONAL RESPONSIBILITY RELATING TO TRUST FUNDS, AND FOR ESTABLISHMENT OF A LAWYER TRUST ACCOUNT BOARD

MEMORANDUM OPINION

This administrative proceeding was commenced by a petition on behalf of the Minnesota State Bar Association ("MSBA") seeking amendments to the Code of Professional Responsibility as applicable in the State of Minnesota and providing for the establishment of a Lawyer Trust Account Board. The petition addresses itself essentially to the provisions of Disciplinary Rule 9-102 of the Code of Professional Responsibility as it pertains to the maintenance of the funds of clients in identifiable bank accounts, *i.e.*, lawyers' trust accounts. Traditionally, such funds have been held in trust by lawyers in a noninterest bearing checking account. This practice developed because of the general unavailability of interest-bearing demand accounts. However, as a matter of practice, individual sums of clients' money which are capable of generating significant amounts of interest are often deposited by lawyers in interest-bearing savings accounts with the interest earned thereon, less the costs of maintaining the account, paid over directly to the client or credited to the client's account. In most cases, however, client funds are small in amount or held for brief periods and thus are presently maintained by each lawyer or law firm in its own so-called "pooled" noninterest bearing checking account. All client funds of a particular lawyer or law firm are deposited in such an account because such funds can be withdrawn for any one client's account upon demand consistent with the directions of the client.

In the summer of 1981, the Board of Governors of the MSBA appointed a special Committee on Interest on Lawyers' Trust Accounts to examine the impact of recent developments in banking law and computer technology which might make it possible to have interest accrue on accounts in which client trust funds were kept. That Committee, comprised of nine lawyers representing various types of law practices and geographic areas in the state, and three public members, was also charged with the responsibility of analyzing and making recommendations to the Board of Governors of the MSBA with respect to the appropriate use of interest that might be earned on deposits in lawyers' trust accounts.

The Committee prepared an extensive report which was submitted to the Board of Governors of the MSBA for consideration. With minor revisions, the Board of Governors approved the report and referred the recommendations to the state convention of the delegates and members of the MSBA. At the General Assembly session of the convention on June 12, 1982, the recommendations of the Committee report were approved by the MSBA convention.

In its report the MSBA Committee concluded that the practice in Minnesota of placing client funds in ordinary checking accounts where they would not draw interest was no longer sensible. There appeared to be a practical vehicle for recovering interest on such accounts through the advent of the negotiable order of withdrawal ("NOW") accounts generally available in Minnesota.

The experience in the Australian states and in the Canadian provinces, and now in several states in the United States, has demonstrated that interest on nominal deposits in trust accounts and on larger deposits held in trust for only a short period of time can be effectively captured and not lost if deposited into a lawyer's "pooled" checking account which pays interest. Organized bars in various Australian states and in the Canadian provinces were first to establish programs, first voluntary and now mandatory, that demonstrated the logic of capturing interest which cannot economically or practically be identified or paid to specific clients and allowing the interest to be used for various law-related, public purposes. See *England and Carlisle, History of Interest on Trust Accounts Program*, 56 Fla.B.J. 101, 102 (1982).

Several states have already taken action to provide for the handling of client trust funds in this manner. Leading in this effort in the United States has been the State of Florida. In that state, the Florida Supreme Court in 1978 approved of such a program. *In Re Interest on Trust Accounts*, 356 So.2d 799 (Fla. 1978). Thereafter, in order to comply with various requirements of the Internal Revenue Service ("IRS"), the program in Florida was revised in certain respects. *See Matter of Interest on Trust Accounts*, 372 So.2d 67 (Fla. 1979); 402 So.2d 389 (Fla. 1981). A voluntary program has now also been adopted by the Supreme Court of Idaho. Both voluntary and mandatory plans are also under consideration in other states at the present time as well.

In the State of California a mandatory program was enacted by legislation. *See* SS 6210-6228 of Calif. Business and Professions Code. This Court has been advised that the California State Bar Association is presently in the process of promulgating regulations that would govern the procedures under the California mandatory interest on trust accounts program for all lawyers in the California integrated bar. The State of Maryland has likewise proceeded via the legislative route with a voluntary plan. *See* 1982 Md.Laws chs. 829, 830, codified at Md.Ann.Code art. 10, S 44 (1982).

Following its study and analysis of these and other interest on lawyers' trust account ("IOLTA") programs, the MSBA Committee recommended that where the amount of interest which client funds would earn during the period they are on deposit would exceed the cost of establishing and administering the account, including bank service charges and the cost of the lawyer's services, such funds should be maintained in a separate interest-bearing trust account for a particular client or client matter with the interest, net of any transaction costs, to be paid or credited to the client. We agree with that recommendation since we believe that when larger sums of interest are involved that can more than cover administrative costs, bank fees and the like, such deposits should not lie idle but should draw interest for the benefit of the client.

The MSBA has demonstrated to this Court, however, that the relatively small amounts of interest to be earned on small deposits and on larger deposits held in trust for only a short period of time do not permit or warrant the establishment of a separate interest-bearing savings account for each of such deposits. The administrative costs of setting up such an account, accounting for such interest on a client-by-client basis, filling out the required IRS and state tax forms for taxing authorities and for the clients,¹ together with the cost of the lawyer's services in administering such accounts, present quite a different situation. We therefore conclude that under these circumstances, a pooled interest-bearing checking account from which client funds can be withdrawn on request and without delay is appropriate for such client funds. Since it is not possible as a practical matter to credit the interest to individual clients, we approve of the proposed concept of allowing such funds to be used for tax-exempt public purposes rather than to allow the interest to be lost.

We recognize that a question immediately arises as to how the attorney will determine which client funds are to be deemed "nominal in amount" or "held in trust for only a short period of time" so as to be placed in the pooled account. We also recognize that an attempt could be made to define such controlling terms, thereby removing entirely the judgment of individual lawyers who will be required to make such decisions. However, the new DR 9-103 which we have this date approved provides, in subparagraph (D), the criteria for the lawyer to use in making a judgment as to whether the client funds should be placed in the lawyer's pooled account with other similar client funds, or placed in a separate interest bearing savings account. We believe that setting out the general factors to be applied by lawyers in their best judgment is a better approach than developing specific definitions where the various parameters of administrative costs, bank fees, current interest rates and other influencing factors fluctuate or change from time to time. We therefore choose to follow the approach of the Florida Supreme Court which concluded that the determination of whether or not a client's funds are "nominal in amount" or "to be held for a short period of time" should rest exclusively in the sound judgment of each attorney or law firm, and that no charge of ethical impropriety or other breach of professional conduct

should attend an attorney's good faith exercise of judgment in that regard. *See Matter of Interest on Trust Accounts*, 402 So.2d 389 at 394 (Fla. 1981). We likewise emphasize, as did the Florida Court, that the test must be the good faith judgment made by the attorney at the time the funds are received and deposited; and not as a result of hindsight reexamination based on how long the funds did in fact actually remain on deposit. *Id.* at n. 14. Obviously, an extreme violation of a lawyer's fiduciary duty to place a client's funds in a separate account for that client at interest amounting to gross neglect of a clients' funds would provide a basis for professional discipline.

Some have urged that the Court adopt an IOLTA program that is voluntary rather than mandatory, *i.e.*, that individual lawyers and law firms be given a choice as to whether to participate or not in such a program. The MSBA committee felt strongly that if a program is to be adopted, it should be applicable to all Minnesota lawyers in order to accomplish its purpose. The membership of the MSBA approved that recommendation at the MSBA convention. Moreover, in a communication to the MSBA from the Director of the Florida IOLTA program, the Florida Director strongly urged that such a program, if adopted in Minnesota, be mandatory so as best to benefit the public through the additional funds that would be available for public purposes. We have concluded that, under all the circumstances, the MSBA's recommendation of a mandatory program should be adopted since the participation of all lawyers in this state will benefit the public at large to the maximum extent.

In some state jurisdictions, the subject of the constitutional base for an IOLTA program has been raised. This has been done in the context of the Fifth Amendment of the U.S. Constitution's protection of private property from a "taking" without just compensation. (*See also* Minnesota Constitution, Art. 1, S 13.)

Another issue that has been raised in other jurisdictions is the Fifth Amendment's protection against deprivation of property without due process of law. (*See also* Minnesota Constitution, Art. 1, S 7.) We do not find that under the circumstances here the client has any "property" that is being taken without compensation or without due process of law under either the Fifth Amendment of the U.S. Constitution or under Article 1, SS 13, 7 of the Minnesota Constitution. *See Matter of Interest on Trust Accounts*, 402 So.2d 389 at 395 (Fla. 1981). There simply is no "property" now in existence that would be taken.

Since we find that no client has a "property interest" which is being taken from him, in the constitutional sense, under this program, we see no need for a legal requirement of the lawyer to notify, in advance, clients whose deposits in lawyers trust accounts are nominal in amount or to be held for a short period of time.² We would suggest, however, that many, if not most, lawyers will, as a matter of good client relations and courtesy, want to notify their clients of their participation in this program in some manner, and we encourage them to do so.

Although our order provides the ethical basis for the IOLTA program in Minnesota, we note that the ABA's Standing Committee on Ethics and Professional Responsibility has issued a formal opinion indicating that there is nothing in the Code of Professional Responsibility that would prohibit a lawyer from participating in state-authorized programs that use interest earned on accounts in which are deposited client's funds, nominal in amount or to be held for a short period of time, and providing for the interest to be paid to certain tax-exempt organizations. *See* ABA Formal Ethics Opinion 348, July 23, 1982.

As far as we can determine, no other state has as yet adopted a plan that provides for a Board established directly under the supervision of the Supreme Court to receive, administer and disburse the funds generated by Interest on Lawyers' Trust Accounts programs. The MSBA has urged that a Board, operating under the jurisdiction of this Court, which has public members as well as lawyers, would best serve the public purposes for which the Board would be created. This newly created Board would hold the entire beneficial interest in the funds earned under the IOLTA program. We adopt that approach and do so having in mind that the purposes for which the funds generated by the program would be used will, as recommended by the MSBA, initially

be limited to that of legal aid to the poor, law-related education, and projects to improve the administration of justice, to the extent the same are consistent with the Internal Revenue Code and regulations promulgated thereunder. *See* England and Carlisle, *supra*, 61 Fla.B.J. 101 at 103.

At the present time there are certain statutory and regulatory restrictions on the use of NOW accounts. Generally, such accounts may not be used by professional associations incorporated under Minnesota Law. These are a common form of law firm organization today. There are exceptions to the NOW account restrictions, however, when the beneficial ownership of the interest generated on such accounts rests in tax-exempt organizations which use the funds for charitable purposes consistent with the Internal Revenue Code and regulations of the IRS. It was on this basis that the Florida Bar Association received an opinion from the General Counsel of the Board of Governors of the Federal Reserve System, dated October 15, 1981, reprinted in Middlebrooks, *The Interest on Trust Accounts Program, Mechanics of its Operation*, 56 Fla.B.J. 115, 116-17 (1982), authorizing financial institutions in Florida to make NOW accounts available to law firms and attorneys in that state, regardless of their form of business organization, since the interest would inure to the benefit of an organization operated for charitable purposes. We recognize that a similar administrative approval may be necessary for the program which we hereby approve in Minnesota. There may be other aspects of the program which we here adopt which need to be approved by, or considered by, other administrative agencies or governmental departments. It is for that reason that our order approving the program recommended by the MSBA provides that the IOLTA program not be effective until July 1, 1983. During the intervening time, the MSBA will have the opportunity to lay the groundwork for implementing the program. We contemplate that appropriate interest-bearing accounts will be conveniently and reasonably available to lawyers throughout the state and that the MSBA will work cooperatively with financial institutions to work toward that goal.

We also are of the view that, as with any new program that breaks with the traditional practices of lawyers, there should be time permitted for the MSBA even further to publicize the program and to explain to all the lawyers in the State of Minnesota, and to the public, how the program will operate. For example, some opposition to the IOLTA program here adopted has been expressed on the grounds that it may require more paperwork and additional administrative burdens and costs for lawyers. It has been represented to the Court by the MSBA that the experience in Florida and in British Columbia has demonstrated that such is not the case. Since it is contemplated that the financial institutions will handle the computation of the interest, provide the Lawyers' Trust Account Board and the lawyer with the pertinent information, and pay over the interest to the Board, net of transaction costs, we see little change in the handling of trust accounts by lawyers in Minnesota under the new program from how they handle their trust accounts at the present time. However, to the extent that any problems arise in the preparation for the date of implementation, such problems should be reported by the MSBA to this Court so that such problems might be appropriately addressed.

¹ The court is aware of the 10% withholding of interest requirements of the new Tax Equity and Fiscal Responsibility Act, Pub.L.No. 97-248, S 301 (codified at I.R.C. SS 3451-3456 (1982)), to become effective July 1, 1983. Such requirements would further complicate the paperwork and administrative burden involved in handling such accounts.

² The IRS approved the Florida program only after the Florida Supreme Court had determined that clients could in no way and to no degree control the creation or destiny of interest earned on the IOLTA program. *See* IRS Revenue Ruling 81-209; 26 CFR S 1.61-7; England and Carlisle, *supra*, 56 Fla.B.J. 101 at 118-119; *Matter of Interest on Trust Accounts*, *supra*, 402 So.2d 389 at 390-391.

Plan for the Minnesota State Board of Legal Certification

Effective October 10, 1985

With amendments received through August 1, 2000

TABLE OF HEADNOTES

Rule

1. Purpose
2. Establishment of the Board
3. Powers and Duties of the Board
4. Director
5. Standards for Approval of Certifying Agencies
6. Minimum Standards for Recognition of Specialists
7. Privileges Conferred and Limitations Imposed
8. Minimum Standards for Continued Recognition of Specialists
9. Fees

TEXT OF RULES

Rule 1. Purpose

The purpose of the Minnesota State Board of Legal Certification (Board) is to regulate the certification of lawyers as specialists by certifying agencies, so that public access to appropriate legal services may be enhanced.

Rule 2. Establishment of the Board

2.01. The Board shall consist of 12 members, of whom nine shall be lawyers licensed in this state and three shall be public members, all to be appointed by the Supreme Court. Three of the lawyer members shall be nominated by the Minnesota State Bar Association. Lawyer members shall be representative of the various fields of legal practice, including general practice.

2.02. One of the lawyer members shall be designated by the Supreme Court as chairperson of the Board for such term as the court shall determine.

2.03. Of the members first appointed, four shall be appointed for one year, four for two years, and four for three years, one in each instance being a nominee of the Minnesota State Bar Association and one in each instance being a public member. Thereafter, appointments shall be for a three-year term. No member may serve more than two three-year terms.

2.04. Members shall serve without compensation but shall be paid their regular and necessary expenses.

2.05. Meetings of the Board shall be held at regular intervals at such times and places and on such notice as the Board may prescribe.

Rule 3. Powers and Duties of the Board

3.01. The Board shall approve and regulate agencies which certify lawyers practicing in this state as specialists. The Board itself will not certify lawyers as specialists.

3.02. Subject to the supervision of the supreme court, the Board has the responsibility for carrying out this Plan and, in that connection, has the following powers and duties:

3.021. To designate those areas of legal practice subject to specialty designation. The Board may make these designations on its own motion or on petition of interested parties and on such criteria as it establishes.

3.022. To approve appropriate agencies as qualified to certify lawyers as specialists in a particular field of law, and to adopt standards which certifying agencies must meet.

3.023. To adopt standards which must be met by certifying agencies in certifying lawyers as specialists.

3.024. To review and evaluate the programs of certifying agencies to assure compliance with this specialization program.

3.025. To deny, suspend, or revoke the approval of a certifying agency upon the Board's determination that the agency has failed to comply with the standards established by this Plan and the rules and standards of the Board.

3.026. To keep appropriate records of those lawyers certified as specialists by agencies approved under this Plan and to report to the Lawyers Professional Responsibility Board any lawyers who may violate the provisions of this Plan.

3.027. To cooperate with other organizations, boards, and agencies engaged in the field of lawyer specialization.

3.028. To enlist the assistance of advisory committees to advise the Board.

3.029. To adopt rules, regulations, policies, and standards reasonably needed to implement this Plan and which are not inconsistent with any of the provisions of this Plan.

Rule 4. Director

4.01. The Supreme Court may appoint a Director of the Board, who shall serve for a term of two years and who shall be paid a salary as the court determines. The Director may be reappointed for successive terms. The Board may make recommendations to the court concerning the appointment, remuneration, and termination of the Director. The court may, however, remove the Director prior to the expiration of any term with or without cause.

4.02. The Director shall be responsible and accountable to the Board and through the Board to the Supreme Court for the proper administration of this program, and shall perform the duties assigned by the Board.

4.03. The Director may employ staff personnel if authorized to do so by the Board and the Supreme Court at such compensation as the court may determine.

Rule 5. Standards for Approval of Certifying Agencies

5.01. The persons in a certifying agency shall include lawyers who, in the judgment of the Board, are experts in the area of the law covered by the specialty and who each have extensive practice or involvement in the specialty area.

5.02. A certifying agency's standards for certification of specialists must include, as a minimum, the standards required for certification set out in this Plan and in the rules, regulations, and standards adopted by the Board from time to time. Such standards shall not unlawfully discriminate against any lawyer properly qualified for certification as a specialist, but shall provide a reasonable basis for the determination that the lawyer possesses special competence in a particular field of law, as demonstrated by the following means:

5.021. Substantial involvement in the specialty area during the three-year period immediately preceding application to the certifying agency. "Substantial involvement" is measured by the amount of time spent practicing in the specialty area: A minimum of 25 percent of the practice of the lawyer must be spent in the specialty area.

5.022. Peer recommendations from attorneys or judges who are familiar with the competence of the lawyer, none of whom are related to, or engaged in legal practice with, the lawyer.

5.023. Objective evaluation of the lawyer's knowledge of the substantive and procedural law in the specialty area, to be determined by written and/or oral examination. The examination shall include a part devoted to professional responsibility and ethics as it relates to the particular specialty.

5.03. The certifying agency shall be responsible for making appropriate investigations of peer recommendations and for the obtaining of any other data that may be required to assure the lawyer is in compliance with the legal certification program.

5.04. The certifying agency shall register all lawyers whom it certifies as specialists pursuant to the Plan and shall report to the Board those lawyers who are certified, maintaining, however, the confidentiality of information on applicants as required by law.

5.05. Each certifying agency shall annually submit to the Board a report of its activities during the previous year, including a demonstration of the measures employed to ensure compliance with the provisions of this rule.

5.06. The certifying agency shall cooperate at all times with the Board and perform such other duties as may be required by the Board so that the Plan is properly administered.

Rule 6. Minimum Standards for Recognition of Specialists

6.01. For a lawyer to be recognized as a certified specialist in this state, the lawyer must be duly licensed in active status and in good standing throughout the period for which specialty designation is granted and comply with the other requirements of this section.

6.02. The lawyer must be certified by an agency approved by the Board.

6.03. The lawyer must complete, every three years, a minimum of 20 hours of continuing legal education course work in the area of the lawyer's specialty. These hours shall constitute a part of the 45-hour CLE requirement. Proof of completion of the required 20 hours shall be submitted to the Board at the end of the lawyer's three-year CLE cycle.

Rule 7. Privileges Conferred and Limitations Imposed

7.01. A lawyer who is certified as a specialist under this program may communicate the fact that the lawyer is certified by the particular certifying agency as a specialist in the area of the law involved. The lawyer shall not represent, either expressly or impliedly, that his or her specialty status is recognized by the Minnesota Supreme Court or the Board or by any entity other than the certifying agency.

7.02. Nothing in this Plan shall in any way limit the right of a recognized specialist to practice in all fields of law. Any lawyer shall have the right to practice in all fields of law, even though recognized as a specialist in a particular field of law.

7.03. No lawyer shall be required to be recognized as a specialist in order to practice in the field of law covered by that specialty. Any lawyer shall have the right to practice in any field of law, even though he or she is not recognized as a specialist in that field. Participation in this Plan shall be on a voluntary basis.

7.04. A lawyer may be recognized as a specialist in more than one field of law. The limitation on the number of specialties in which a lawyer may be recognized as a specialist shall be determined only by such practical limits as are imposed by the requirement of substantial involvement and such other standards as may be established by the Board in Rule 6 as a prerequisite to recognition as a specialist.

Rule 8. Minimum Standards for Continued Recognition of Specialists

8.01. The period of recognition as a specialist shall be six years. During this period the Board or appropriate certifying agency may require evidence from the specialist of his or her continued qualification for recognition as a specialist.

8.02. Application for and approval of continued recognition as a specialist shall be required prior to the end of each six-year period. To qualify for continued recognition as a specialist, a lawyer applicant must pay the required fee and meet the requirements of certification renewal established by Board rule.

(Amended January 17, 1986.)

Rule 9. Fees

9.01. To defray expenses of the State Board of Legal Certification, the Board may establish and collect reasonable fees from the certifying agencies and from the lawyers certified as specialists under this Plan.

Internal Rules for the State Board of Legal Certification

Effective October 28, 1986

With amendments received through August 1, 2000

TABLE OF HEADNOTES

JURISDICTION

Rule

- 101. Definitions
- 102. Composition of the Board
- 103. Meetings
- 104. Powers and Duties of the Board
- 105. Eligibility for Authorization to Certify
- 106. Application for Authorization to Certify
- 107. Review of Application of Certifying Agency
- 108. Standards for Certifying Attorneys
- 109. Information Disclosure
- 110. Announcement of Authorization
- 111. Automatic Denial or Revocation of Certification
- 112. Discretionary Denial or Revocation of Certification
- 113. Announcement of Certification
- 114. Fees
- 115. Renewal of Authorization
- 116. Reporting

TEXT OF RULES

Jurisdiction.

The State Board of Legal Certification has exclusive authority to define specialty areas of law and to establish its own rules and regulations for the governance of certification in conformity with the Plan for the Minnesota State Board of Legal Certification.

Rule 101. Definitions

- a. "Applicant Agency" means persons who submit a proposal for accreditation in a specialty area.
- b. "Applicant Attorney" means an attorney who seeks certification from a certifying agency.
- c. "Board" means the State Board of Legal Certification.
- d. "Certified Attorney" means an attorney who has received certification from a certifying agency.
- e. "Certifying Agency" means an applicant agency authorized by the Board to certify attorneys in a specialty area.
- f. "Plan" means the Plan for the Minnesota State Board of Legal Certification adopted by the Minnesota Supreme Court, October 10, 1985.
- g. "Rules" means the plan and other rules promulgated by the Supreme Court governing the Board and the internal rules established by the Board.
- h. "Specialty Area" means a field of legal practice that is approved by the Board.

Rule 102. Composition of the Board

- a. The Supreme Court shall appoint twelve members of the Board, of whom nine shall have active licenses to practice law in the state and represent various fields of

legal practice, and of whom three shall be public members. The Minnesota State Bar Association shall nominate three of the attorney members. The Supreme Court shall designate an attorney member as chairperson, and the Board may elect other officers.

b. Four members shall be appointed for one year, four members for two years, and four members for three years, and thereafter appointments shall be for three-year terms. The terms of one public member and one State Bar nominee should expire each year. Any vacancy on the Board shall be filled by the Supreme Court by appointment for the unexpired term. No member may serve more than two three-year terms.

c. Members shall serve without compensation, but shall be paid their regular and necessary expenses.

Rule 103. Meetings

a. Meetings of the Board will be at times and places set by the chairperson.

b. The Board may make determinations by a majority vote of those present at a meeting, except that the determinations to approve or rescind an authorization to certify must be made by a majority of the members of the Board, and changes in internal rules of the Board must be made by a majority of the members of the Board after review of the proposed changes by the Supreme Court.

c. The Board may meet by conference call or make determinations through mail votes, except that changes in the internal rules of the Board shall be made at a meeting, after written notice.

Rule 104. Powers and Duties of the Board

a. The Board is authorized:

1. To designate those areas of legal practice that qualify as specialty areas, on its own motion or at the request of interested parties;

2. To approve, deny, or rescind authority of agencies in specialty areas;

3. To develop standards, testing procedures, and other criteria for reviewing, approving and evaluating certifying agencies;

4. To establish procedures for review and challenge to actions of a certifying agency or the Board;

5. To maintain appropriate records of certifying agencies and certified attorneys;

6. To require reports and other information regarding the certification program;

7. To coordinate with advisory committees, other boards and organizations engaged in related fields;

8. To adopt rules and charge fees reasonably related to the implementation of the Plan and not inconsistent with rules of the Court;

9. To set the number of Continuing Legal Education credits in the specialty area which must be reported at the attorney's immediately subsequent Continuing Legal Education deadline.

b. The chairperson shall convene the Board as necessary, and between meetings shall act on behalf of the Board in working with agencies and other organizations working in attorney specialization. The chairperson may appoint subcommittees of the Board.

c. In the absence of the chairperson, duties shall be handled by a vice-chairperson elected by the members of the Board.

d. The Board may hire a director to perform duties as assigned by the Board, including but not limited to:

1. Receiving, reviewing, and processing applications for certification and renewal of certification;

2. Investigating applicant agencies and obtaining other information as required by the Board;
3. Reporting to the Board on complaints, failures to cooperate, and failures to abide by the decisions of the Board relating to certifying agencies;
4. Conducting ongoing research in the progress of the certification plan in Minnesota and those in other states;
5. Analyzing reports of certifying agencies and preparing other reports for the Board.

Rule 105. Eligibility for Authorization to Certify

An applicant agency may apply to the Board for authorization to certify attorneys in a specialty area if:

- a. There are among its permanent staff, operating officers, or board of directors at least three legal practitioners from different law firms or businesses whose daily work involves a sophisticated legal knowledge of the specialty area, all of whom shall provide guidance in evaluating performance of attorneys;
- b. The certification program of the applicant agency is available to attorneys without discrimination as to membership in the applicant agency, or geographical location of the attorney;
- c. There is in place a mechanism to publicize the program of the applicant agency that reaches attorneys licensed to practice in Minnesota who may be interested in the specialty area;
- d. The applicant agency is an ongoing business expected to continue to provide an acceptable certification program for an indefinite period of time;
- e. The applicant agency agrees to be subject to Minnesota rules regulating attorneys and to Minnesota laws.

Rule 106. Application for Authorization to Certify

An applicant agency may apply for authority to certify lawyers as specialists by submitting and filing an application (Appendix A) at the staff office of the Board, in the manner prescribed by the Board.

Rule 107. Review of Application of Certifying Agency

- a. Each application shall be reviewed by the director for completeness and clarity prior to submission to the Board. An incomplete application shall not be referred to the Board, and may be returned without action. The review shall include an interview with the applicant agency's contact person.
- b. When complete information has been received and the initial interview concluded, the chairperson shall schedule a meeting of the Board for a determination of certifying an applicant agency. The chairperson may delay consideration of an application to await material from another applicant agency in the same specialty area.
- c. The Board may investigate or hire persons to perform additional investigation of the applicant agency and matters contained in the application. The application shall be verified from confirming data, references and attestations from third parties, onsite inspections, or other means.
- d. The Board may authorize more than one applicant agency to certify attorneys in a specialty area.
- e. The Board may require specific courses or evaluations to be included in the program of an applicant agency, may impose standards for satisfaction of the applicant agency's requirements by certified attorneys, and may specify methods for record keeping and reporting to the Board.
- f. The Board may grant conditional authorization to an applicant agency, pending receipt of evidence showing satisfaction of requirements imposed by the Board.

g. In addition to conditional authorization, the Board may grant authority for the applicant agency to certify, deny authority, request an investigation and verification of matters, or request additional information from the applicant agency. A denial shall specify those portions of the application which are incomplete or unacceptable, and state reasons for denial.

h. An application may be denied for any of the following reasons:

1. The agency is not eligible under Rule 105;
2. The application is incomplete, investigation has revealed inaccuracies, or the applicant agency has been uncooperative in the initial review;
3. The definition of the specialty area is unacceptable;
4. Goals and methods of measuring attainment of those goals are not sufficiently clarified;
5. Tests and other performance criteria for the applicant attorneys are inadequate;
6. Proper procedures are not in place for recertification of certified attorneys, due process for attorneys in case of denial of certification, evaluation of the program, or reporting to the Board;
7. Violation of a rule.

i. An applicant agency denied authority to certify after the Board hearing may not reapply for twelve months.

Rule 108. Standards for Certifying Attorneys

An attorney may be certified in a specialty area for consecutive periods not exceeding six years each by complying with the rules and certifying agency's procedures for certification and recertification.

A certifying agency may accept applications for certification if:

- a. The attorney is licensed and on active status in Minnesota;
- b. The attorney is able to show by independent evidence "substantial involvement" in the specialty area during the three-year period immediately preceding enrollment. "Substantial involvement" means at least 25% of the attorney's practice is spent in the specialty area of certification;
- c. The certifying agency verifies three written peer recommendations, or more if required by the Board, in addition to references submitted by the attorney from attorneys or judges unrelated to, and not in legal practice with, the attorney;
- d. The attorney successfully completes an objective evaluation of the attorney's knowledge of the substantive and procedural law in the specialty area, as determined by written and/or oral examination; grading standards for tests must be available prior to the test administration, and model answers must be available for inspection after test results are determined;
- e. The attorney successfully completes an examination which includes a part devoted to professional responsibility and ethics as it relates to the particular specialty;
- f. The attorney is current with CLE credits for any state of licensure throughout the period of application;
- g. The attorney signs a release to share information of the applicant agency with the Board.

Rule 109. Information Disclosure

Applications submitted by applicant agencies shall be available for inspection at reasonable times at the staff office of the Board. The chairperson should provide notice to Minnesota attorneys that an application has been received for a particular specialty area.

Rule 110. Announcement of Authorization

An accredited agency may announce "Authorized to certify attorneys in the specialty area of _____ by the Minnesota State Board of Legal Certification." Conditional authority shall be stipulated where appropriate.

Rule 111. Automatic Denial or Revocation of Certification

The certification of an attorney will automatically be denied or revoked if:

- a. The attorney fails to maintain 20 CLE credits in the specialty area each reporting period;
- b. The attorney is suspended or disbarred from the practice of law in any jurisdiction in which the attorney is licensed;
- c. The attorney is suspended for nonpayment of license fees or for failing to maintain mandatory Continuing Legal Education credits for the attorney's license;
- d. The attorney fails to satisfactorily complete recertification;
- e. The attorney fails to pay the required fee established by the Board.

Rule 112. Discretionary Denial or Revocation of Certification

The certification of an attorney may be denied or revoked if:

- a. The authority of the certifying agency is rescinded by the Board. The Board has the authority to determine how the certification of attorneys certified by the agency shall be affected;
- b. The attorney fails to cooperate with, or submits false or misleading information during the certification or recertification process;
- c. The attorney's record contains evidence of personal or professional misconduct which is inconsistent with the standards of conduct adopted by the certifying agency and approved by the Board;
- d. The attorney falsely or improperly announces the specialty area of certification;
- e. The attorney seeks decertification and advises the Board and the certifying agency in writing.

(Amended May 18, 1992.)

Rule 113. Announcement of Certification

An attorney who is certified as a specialist under this program may communicate the fact that the attorney is certified by the particular certifying agency as a specialist in the area of law involved. The attorney shall not represent, either expressly or impliedly, that the specialty status is recognized by the Minnesota Supreme Court or the Board or by any entity other than the certifying agency.

Rule 114. Fees

The Board shall set and amend fees for the filing and initial processing of applications for authorization, and may charge reasonable fees for investigations, onsite inspections, and authorization renewals of certifying agencies and for costs incidental to certifying attorneys.

Rule 115. Renewal of Authorization

a. The Board shall review the authorization of each certifying agency at least once every three years, and may begin review on its own motion or that of an individual attorney, or the Supreme Court.

b. The certifying agency shall be given 60 days notice of an authorization renewal. During the 60 days the certifying agency shall cooperate with the Board in providing information including, but not limited to:

1. An update of all application information;

2. The certifying agency's critique of its certification program, including evaluations from students and faculty, and analysis of achievement of program goals;
 3. Copies of examinations and model answers;
 4. Names, addresses and performance information on each applicant or certified attorney;
 5. A report of the certifying agency's recertification of attorneys;
 6. Other information specified by the Board.
- c. The Board may require an onsite inspection, an audit of courses, references from applicant or certified attorneys, a hearing with the certifying agency's contact person, or other information.
- d. Actions of the Board and rights of the certifying agency shall be the same as for initial review of applications.
- e. If the Board rescinds the authority of a certifying agency, the certifying agency shall contact, by notice prescribed by the Board, each attorney enrolled in the certifying agency's certification program or then holding a certification from the certifying agency, and shall cease all advertising and announcements indicating Board authorization.

Rule 116. Reporting

- a. A certifying agency is responsible for reporting to the Board as follows:
1. Proposed changes in a certifying agency's standards for certification shall be submitted to the Board at least 60 days before they are effective. The Board may require a review of the authorization to certify.
 2. When advised by the Board of a certification review, a certifying agency shall submit an updated application and other information as the Board may require.
 3. Within 30 days of certifying an attorney, a certifying agency shall notify the Board of the attorney's name, Minnesota license number, home and work addresses, and other states where the attorney is licensed. The notice shall be in the form of an affidavit signed by the certifying agency and the attorney.
 4. Within 30 days of denying or revoking certification to an attorney, a certifying agency shall notify the Board of the attorney's name, Minnesota license number, work address, and reason for denial or revocation.
 5. By January 20 of each year, a certifying agency shall submit statistics and summaries showing the progress of its certification program.
- b. The Board is responsible for reporting as follows:
1. The Board shall report to the State Board of Continuing Legal Education all specialty areas of practice authorized and the definitions of each. The Board shall have final authority to determine whether a course is within a specialty definition.
 2. The Board shall be advised by the State Board of Continuing Legal Education of the compliance or noncompliance of each certified attorney.
 3. The Board shall publish and otherwise make available the list of specialty areas of certification and the applicant agencies authorized to certify.
 4. The Board shall report to the Lawyers' Professional Responsibility Board any attorney who may violate the provisions of the plan.
 5. The Board shall file an annual report with the Supreme Court.
- c. An attorney who is certified in a specialty area shall report:
1. The specialty area on the Continuing Legal Education Affidavit of Attendance.
 2. The number of Continuing Legal Education credits required pursuant to Rule 104.a.9.
- d. An attorney certified in more than one specialty area, who attends a Continuing Legal Education course that could apply to each of the two specialty areas, may count

full attendance for each specialty area. One course may not be counted for more than two specialty areas.

e. An attorney failing to comply with the regulation of 20 specialty hours of Continuing Legal Education shall be reported to the Board. An attorney who fails to comply may lose certification and may be reported to the Lawyers' Professional Responsibility Board.

Rules of the Minnesota Client Security Board

Effective July 1, 1987

With amendments received through August 1, 2000

TABLE OF HEADNOTES

Rule 1. Rules Governing the Client Security Board

- 1.01 Membership of the Board
- 1.02 Terms of Office
- 1.03 Reimbursement
- 1.04 Meetings
- 1.05 Immunity
- 1.06 Duties of the Board
- 1.07 Conflict of Interest
- 1.08 Duties of the Director
- 1.09 Confidentiality
- 1.10 Annual Report

Rule 2. Rules Governing the Fund

- 2.01 Establishment of the Fund
- 2.02 Financing
- 2.03 Ordering, Reinstatement and Cancellation of Assessments
- 2.04 Failure to Pay Assessment
- 2.05 Disbursements from the Fund

Rule 3. Rules Governing the Claim Process

- 3.01 Claims Payment Discretionary
- 3.02 Filing Claims
- 3.03 Privileged Complaints
- 3.04 Screening Claims
- 3.05 Claim Investigation
- 3.06 Rights of Lawyer Subject to Claim
- 3.07 Lawyer Cooperation
- 3.08 Subpoena
- 3.09 Jurisdiction
- 3.10 Action after Investigation
- 3.11 Panels
- 3.12 Request for Hearing
- 3.13 Hearing
- 3.14 Determination
- 3.15 Denial
- 3.16 Reconsideration
- 3.17 Subrogation
- 3.18 Notification of Claim Paid
- 3.19 Deleted

Rule 4. Rule Governing Education

- 4.01 Education

TEXT OF RULES**Rule 1. Rules Governing the Client Security Board****1.01 Membership of the Board**

The Supreme Court shall appoint seven members to the Client Security Board. Five shall be lawyers actively practicing in the state, three of whom shall be nominees of the Minnesota State Bar Association, and two shall be public members. The Board shall elect a Chair from its members.

(Amended effective July 1, 1995.)

1.02 Terms of Office

Two members of the Board shall be appointed for one year, two members for two years and three members for three years, and thereafter appointments shall be for three-year terms. The terms of public members shall be staggered. Any vacancy on the Board shall be filled by appointment of the Supreme Court for the unexpired term. No member may serve more than two consecutive three-year terms, in addition to any additional shorter term for which the person was originally appointed.

(Amended effective July 1, 1995.)

1.03 Reimbursement

Members shall serve without compensation, but shall be paid their regular and necessary expenses.

1.04 Meetings

The Board shall meet at least annually, and at other times as scheduled by the Chair. A quorum shall consist of four members.

(Amended effective July 1, 1995.)

1.05 Immunity

The Board and its staff are absolutely immune from civil liability for all acts in the course of their official duties.

1.06 Duties of the Board

The Board is authorized:

- a. To administer and operate the Minnesota Client Security Fund, pursuant to statutes, court rules and internal procedures;
- b. To make final determinations on disbursement from the Fund;
- c. To recommend to the Supreme Court limits for the amount payable per claim against the Fund, and for total reimbursement for claims arising from one lawyer's misconduct;
- d. To undertake investigation of claims, coordinating with the Office of Lawyers Professional Responsibility;
- e. To recommend to the Supreme Court means available to cover extraordinary losses in excess of the assets of the Fund;
- f. To annually establish an administrative budget which may be paid from the Fund;
- g. To enforce subrogation and lien rights of the Fund;
- h. To sue in the name of the Fund for restitution of payments made pursuant to claims;
- i. To cooperate in educational activities for theft prevention and risk management, and for remedial services for problem lawyers;

- j. To certify the financial condition of the Fund;
- k. To employ and compensate consultants, legal counsel and employees;
- l. To adopt internal rules of procedure not inconsistent with these rules, and make recommendations to the Supreme Court on rule changes.

1.07 Conflict of Interest

- a. A member of the Board who has or had a lawyer-client relationship or financial relationship with a claimant or the lawyer subject to the claim shall not participate in the investigation or adjudication of the matter.
- b. A member of the Board who is a member or of counsel in the same law firm or company as the lawyer subject to the claim shall not participate in the matter.

1.08 Duties of the Director

The Board may recommend to the Supreme Court a Director, who shall serve at the pleasure of the Court, to perform duties assigned to the Board, including but not limited to:

- a. Screening claims, coordinating investigations with the Lawyers Professional Responsibility Board, and presenting claims at Board hearings;
- b. Coordinating enforcement of liens, restitution and subrogation rights of the Fund;
- c. Maintaining records of the Board, suitable for audit of the Fund;
- d. Keeping current on legal and procedural developments of the client security funds in other states;
- e. Performing other duties as assigned by the Board.

(Amended effective July 1, 1995.)

1.09 Confidentiality

Claims, proceedings and reports involving claims for reimbursement are confidential until the Board authorizes reimbursement to the claimant, except as provided below.

- a. After payment of the reimbursement, the Board shall publicize the nature of the claim, the amount of reimbursement and the name of the lawyer. The name and the address of the claimant shall not be publicized by the Board unless specific permission has been granted by the claimant.
- b. This Rule shall not be construed to deny access to relevant information by professional disciplinary agencies or other law enforcement authorities as the Board shall authorize the release of statistical information which does not disclose the identity of the lawyer or the parties.

(Amended effective July 1, 1995.)

1.10 Annual Report

At least once a year and at such other times as the Supreme Court may order, the Board shall file with the Court a written report reviewing in detail the administration of the Fund, its operation, its assets and liabilities.

Rule 2. Rules Governing the Fund

2.01 Establishment of the Fund

There is created a Minnesota Client Security Fund to aid those persons directly injured by the dishonest conduct of any lawyer during an attorney-client or fiduciary relationship.

(Amended effective July 1, 1995.)

2.02 Financing

The Fund shall be financed from:

- a. Lawyer restitution and subrogation for claims paid;
- b. Gifts and contributions;
- c. Upon order of the Supreme Court, assessments of licensed lawyers.

2.03 Ordering, Reinstatement and Cancellation of Assessments

The Supreme Court may order, reinstate or cancel the collection of assessments after review of the financial condition of the Fund certified by the Client Security Board in its annual report.

2.04 Failure to Pay Assessment

Upon failure to pay the assessment when due, the lawyer's right to practice law in the state shall be automatically suspended.

(Amended effective July 1, 1995.)

2.05 Disbursements from the Fund

- a. Upon written authorization of the Board, claims may be paid from the Fund.
- b. The Board shall annually prepare an administrative budget to be approved by the Supreme Court, from which the Board may pay necessary expenses.
- c. The fund shall be invested as provided by law.

(Amended effective July 1, 1995.)

Rule 3. Rules Governing the Claim Process**3.01 Claims Payment Discretionary**

Reimbursements of losses by the Board are discretionary, and not a matter of right. No person shall have a right in the Fund as a third party beneficiary or otherwise either before or after allowance of a claim.

3.02 Filing Claims

The Board shall consider a claim filed on forms provided by the Board if:

- a. The claimant experienced a loss of money or property, excluding loss of profit, consequential damages, interest, and costs of recovery; and
- b. The loss of the claimant arose out of and during the course of a lawyer-client relationship of a matter in this state, or a fiduciary relationship between the lawyer and the claimant which arose out of a lawyer-client relationship in this state; and
- c. The loss was caused by the dishonest conduct of the lawyer and the claim was not based on negligence; and
- d. There is no reasonably available collateral source for reimbursement to the claimant, such as insurance, surety, bond, or some other fund; and
- e. Reasonable efforts have been made by the claimant to exhaust administrative and civil remedies; and
- f. The lawyer was licensed to practice law in this state at the time of the misconduct or was licensed within three years prior to the misconduct; and
- g. Less than three years have elapsed between the filing of the claim and the date the claimant knew or should have known of the dishonest conduct; and
- h. The dishonest conduct occurred on or after January 1, 1964.
- i. As used in these Rules, "dishonest conduct" means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value, including but not limited to:

(1) Refusal or failure to refund an advance fee when the lawyer performed no work whatever, or an insignificant portion of the services that he or she agreed to perform. All other instances of a lawyer failing to return an unearned fee or the disputed portion of a fee are outside the scope of the Fund.

(2) Obtaining money or property from a client representing that it was to be used for investment purposes when no such investment was made. The failure of an investment to perform as represented to, or anticipated by, the applicant is outside the scope of the Fund.

(j) For purposes of these Rules, including but not limited to those acts set out in Rule 3.02(i), all payments made by the lawyer to the client following the dishonest conduct, however denominated by the lawyer, shall be treated as restitution of principal.

(Amended effective July 1, 1995.)

3.03 Privileged Complaints

A claim filed pursuant to these Rules is absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the claimant.

3.04 Screening Claims

The Chair shall designate a Board member or the Director to screen a claim and to advise the lawyer named in the claim that the lawyer has 20 days to respond to the Board in writing. The lawyer shall receive a copy of the claim, by first class mail sent to the lawyer's last known address.

(Amended effective July 1, 1995.)

3.05 Claim Investigation

If a claim is sufficient, the Director shall promptly request the Office of Lawyers Professional Responsibility to furnish a report on any investigation of the matter.

3.06 Rights of Lawyer Subject to Claim

A lawyer subject to a claim shall be entitled to receive a copy of the claim, to respond to the claim in writing to the Board, and to request an evidentiary hearing as provided by Rule 3.12.

(Amended effective July 1, 1995.)

3.07 Lawyer Cooperation

It shall be the duty of a lawyer subject to a claim to cooperate and comply with the reasonable requests of the Board and the Board's investigator by furnishing papers, documents or objects, providing a full written explanation, and appearing at conferences and hearings. The lawyer's failure to respond or cooperate may be reported to the Office of Lawyers Professional Responsibility for possible discipline under this rule.

(Amended effective July 1, 1995.)

3.08 Subpoena

With the approval of the Board Chair, the Director may subpoena and take testimony of any person believed to possess information concerning a claim.

(Amended effective July 1, 1995.)

3.09 Jurisdiction

The district court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the investigation of a claim.

(Amended effective July 1, 1995.)

3.10 Action after Investigation

No later than 120 days from the date of the notification to the Office of Lawyers Professional Responsibility, whether or not the Director has received a report from the Lawyers Professional Responsibility Board, the Chair shall determine whether additional investigation should be conducted, a hearing should be held, or a determination may be immediately rendered.

(Amended effective July 1, 1995.)

3.11 Panels

The Chair may 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 Chair for each panel. A panel may be assigned to consider a matter and make a recommendation to the entire Board, or may conduct a hearing under Rule 3.12 in lieu of a hearing before the entire Board.

(Amended effective July 1, 1995.)

3.12 Request for Hearing

If the claimant or the lawyer subject to the claim requests an evidentiary hearing, the Chair may order such a hearing, defer the matter for further investigation or until any proceedings of the Lawyers Professional Responsibility Board have been completed, or deny the request.

(Amended effective July 1, 1995.)

3.13 Hearing

If an evidentiary hearing under Rule 3.12 is ordered, both the claimant and the lawyer and their representatives may appear. The hearing shall be recorded and preserved for five years.

(Amended effective July 1, 1995.)

3.14 Determination

a. Payment of a claim from the Fund shall be made only on affirmative vote of four members.

b. In determining the amount of any payment, the Board may consider:

(1) Monies available and likely to become available to the Fund for payment of claims;

(2) Size and number of claims presented and likely to be presented in the future;

(3) The amount of a claimant's loss compared with losses sustained by others;

(4) The comparative hardship suffered by a claimant because of a loss;

(5) The total amount of losses caused by the dishonest conduct of any one lawyer;

(6) The culpability or negligence of the claimant contributing to the loss;

(7) The extent to which there is a collateral source for reimbursement to the claimant;

(8) The effort made by the claimant to exhaust administrative and civil remedies;

(9) Other factors as appear to be just and proper.

c. The maximum amount that may be paid to any claimant for a single claim is \$100,000. In exceptional circumstances, the Board may allow a greater or lesser amount based on the factors set forth in subdivision (b) of this rule.

d. The Board may, in its discretion, award interest on any award at the rate of interest payable under Minnesota Statutes, section 549.049, from the date of filing the claim. In determining the amount of interest, if any, the Board may consider:

- (1) The length of time between filing the claim and its disposition;
- (2) The existence of third-party litigation; and
- (3) Other factors outside the control of the Board.

(Amended effective December 3, 1993; the amendments to Rule 3.14 are retroactively effective for all claims filed on or after February 1, 1993; amended effective July 1, 1995.)

3.15 Denial

If the Board determines that the criteria of Rule 3.02 have not been met, the Board may deny the claim. The Board may authorize payment of that portion of a claim proved, although the entire amount of a claim is undetermined. The Board may defer payment of a claim in order to await completion of investigations of related claims, or for payment in subsequent fiscal years. The claimant and the lawyer shall be notified in writing of the Board's determination.

(Amended effective July 1, 1995.)

3.16 Reconsideration

If a claim has been reduced or denied by the Board, a claimant may request reconsideration of the determination within 30 days by submitting a written request to the Board. A claimant may not seek reconsideration if the full claim is allowed but a lesser amount has been authorized for payment under Rule 3.14(b) or (c), or on the basis that the Board did not award interest under Rule 3.14(d).

(Amended effective July 1, 1995.)

3.17 Subrogation

A claim paid pursuant to these Rules shall be repaid to the Fund by the lawyer. The Board shall obtain a subrogation agreement from the claimant. The Board may bring an action against the lawyer, the lawyer's assets, the lawyer's estate, the lawyer's law firm or partner(s), or any other person(s) or entities against which subrogation rights may be enforced, or may file liens against the property of the lawyer in the name of the Fund, in an amount equal to the sum paid the claimant plus the Board's attorney fees and costs. The claimant shall be notified of any action and may join in the action to press a claim for the loss in excess of the amount paid by the Fund, but the Fund shall have first priority to any recovery in the suit.

(Amended effective July 1, 1995.)

3.18 Notification of Claim Paid

a. The Board shall advise the Office of Lawyers Professional Responsibility of any claim paid, the amount paid, and the name of the lawyer.

b. Upon request of the lawyer, the Board may advise a lawyer admission or discipline authority of another jurisdiction the status of any file on the lawyer.

(Amended effective July 1, 1995.)

3.19 (Deleted July 1, 1995.)

Rule 4. Rule Governing Education

4.01 Education

The Board or the Director shall conduct research, analyze statistics, and categorize claims to determine whether there are methods and programs that would minimize lawyer misconduct resulting in claims against the Fund. The Board shall make recommendations to the Court of any such programs.

(Amended effective July 1, 1995.)

Code of Professional Responsibility for Interpreters in the Minnesota State Court System

Adopted effective January 1, 1996

Preamble

Applicability

TABLE OF CANONS

Canon

1. Accuracy and Completeness
2. Representation of Qualifications
3. Impartiality and Avoidance of Conflict of Interest
4. Professional Demeanor
5. Confidentiality
6. Restriction of Public Comment
7. Scope of Practice
8. Assessing and Reporting Impediments to Performance
9. Duty to Report Ethical Violations
10. Professional Development

PREAMBLE

Many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency, or a speech or hearing impairment. It is essential that the resulting communication barrier be removed, as far as possible, so that these persons are placed in the same position as similarly situated persons for whom there is no such barrier. As officers of the court, interpreters help assure that such persons may enjoy equal access to justice and that court proceedings and court support services function efficiently and effectively. Interpreters are highly skilled professionals who fulfill an essential role in the administration of justice.

(Added effective January 1, 1996.)

APPLICABILITY

This code shall guide and be binding upon all persons, agencies and organizations who administer, supervise, use, or deliver interpreting services within the Minnesota state court system.

(Added effective January 1, 1996.)

Commentary

The use of the term "shall", is reserved for the black letter principles. Statements in the commentary use the term "should" to describe behavior that illustrates or elaborates upon the principles. The commentaries are intended to convey what the drafters of this code believe to be probable and expected behaviors. Wherever a court policy or routine practice appears to conflict with the commentary in this code, it is recommended that the reasons for the policy or practice as it applies to court interpreters be reviewed for possible modification.

(Added effective January 1, 1996.)

TEXT OF CANONS

Canon 1. Accuracy and Completeness

Interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to the meaning of what is stated or written, and without explanation.

(Added effective January 1, 1996.)

Commentary

The interpreter has a twofold duty:

- 1) to ensure that the proceedings reflect in English precisely what was said by a non-English speaking person, and
- 2) to place the non-English speaking person on an equal footing with those who understand English.

This creates an obligation to conserve every element of information contained in a source language communication when it is rendered in the target language.

Therefore interpreters are obligated to apply their best skills and judgment to faithfully preserve the meaning of what is said in court, including the style or register of speech. Verbatim, "word for word" or literal oral interpretations are not appropriate when they distort the meaning of what was said in the source language, but every spoken statement, even if it appears non-responsive, obscene, rambling, or incoherent should be interpreted. This includes apparent misstatements.

Interpreters should never interject any statement or elaboration of their own. If the need arises to explain an interpreting problem (e.g. a term or phrase with no direct equivalent in the target language or a misunderstanding that only the interpreter can clarify), the interpreter should ask the court's permission to provide an explanation. Spoken language interpreters should convey the emotional emphasis of the speaker without reenacting or mimicking the speaker's emotions, or dramatic gestures. Sign language interpreters, however, must employ all of the visual cues that the language they are interpreting for requires — including facial expressions and body language, in addition to hand gestures. Judges, therefore, should ensure that court participants do not confuse these essential elements of the interpreted language with inappropriate interpreter conduct. Any challenge to the interpreter's conduct should be directed to the judge.

The obligation to preserve accuracy includes the interpreter's duty to correct any errors of interpretation discovered by the interpreter during the proceeding. Interpreters should demonstrate their professionalism by objectively analyzing any challenge to their performance.

The ethical responsibility to accurately and completely interpret includes the responsibility of being properly prepared for interpreting assignments. Interpreters are encouraged to obtain documents and other information necessary to familiarize themselves with the nature and purpose of a proceeding. Prior preparation is especially required when testimony or documents include highly specialized terminology and subject matter.

(Added effective January 1, 1996.)

Canon 2. Representation of Qualifications

Interpreters shall accurately and completely represent their certifications, training, and pertinent experience.

(Added effective January 1, 1996.)

Commentary

Acceptance of a case by an interpreter conveys linguistic competency in legal settings. Withdrawing or being asked to withdraw from a case after it begins causes a disruption of

court proceedings and is wasteful of scarce public resources. It is therefore essential that interpreters present a complete and truthful account of their training, certification and experience prior to appointment so the officers of the court can fairly evaluate their qualifications for delivering interpreting services.

(Added effective January 1, 1996.)

Canon 3. Impartiality and Avoidance of Conflict of Interest

Interpreters shall be impartial and unbiased and shall refrain from conduct that may give an appearance of bias. Interpreters shall disclose any real or perceived conflict of interest.

(Added effective January 1, 1996.)

Commentary

The interpreter serves as an officer of the court and the interpreter's duty in a court proceeding is to serve the court and the public to which the court is a servant. This is true regardless of whether the interpreter is publicly retained at government expense or retained privately at the expense of one of the parties.

The interpreter of record should avoid any conduct or behavior that presents the appearance of favoritism toward any of the parties. Interpreters should maintain professional relationships with their clients, and should not take an active part in any of the proceedings. The interpreter should discourage a non-English speaking party's personal dependence.

During the course of the proceedings, interpreters of record should not converse with parties, witnesses, jurors, attorneys, or with friends or relatives of any party, except in the discharge of their official functions. Official functions may include an informal preappearance assessment to include the following:

- 1. culturally appropriate introductions;*
- 2. a determination of variety, mode, or level of communication;*
- 3. a determination of potential conflicts of interest; and*
- 4. a description of the interpreter's role and function.*

The interpreter should strive for professional detachment. Verbal and non-verbal displays of personal attitudes, prejudices, emotions, or opinions should be avoided at all times.

Any condition that interferes with the objectivity of an interpreter constitutes a conflict of interest and must be disclosed to the judge. The interpreter should only divulge necessary information when disclosing the conflict of interest. The following are circumstances that create potential conflicts of interest that must be disclosed:

- 1. the interpreter is a friend, associate, or relative of a party or counsel for a party involved in the proceedings;*
- 2. the interpreter or the interpreter's friend, associate, or relative has a financial interest in the subject matter in controversy, a financial interest in a party to the proceeding, or any other interest that would be affected by the outcome of the case;*
- 3. the interpreter has served in an investigative capacity for any party involved in the case at issue;*
- 4. the interpreter has previously been retained by a law enforcement agency to assist in the preparation of the criminal case at issue;*
- 5. the interpreter has been involved in the choice of counsel or law firm for that case at issue;*
- 6. the interpreter is an attorney in the case at issue;*
- 7. the interpreter has previously been retained for private employment by one of the parties to interpret in the case at issue; or*

8. for any other reason, the interpreter's independence of judgment would be compromised in the course of providing services.

The existence of any one of the above-mentioned circumstances does not alone disqualify an interpreter from providing services as long as the interpreter is able to render services objectively. An interpreter may serve if the judge and all parties consent. If an actual or apparent conflict of interest exists the interpreter may, without explanation to any of the parties or the judge, decline to provide services.

Should an interpreter become aware that a non-English speaking participant views the interpreter as having a bias or being biased, the interpreter should disclose that knowledge to the judge.

(Added effective January 1, 1996.)

Canon 4. Professional Demeanor

Interpreters shall conduct themselves in a manner consistent with the dignity of the court.

(Added effective January 1, 1996.)

Commentary

Interpreters should know and observe the established protocol, rules, and procedures for delivering interpreting services. When speaking in English, interpreters should speak at a rate and volume that enables them to be heard and understood throughout the courtroom. If an interpreter is not actively interpreting, the interpreter should not engage in any distracting activity in the courtroom such as reading newspapers or magazines or engaging in conduct that may call inappropriate attention to the interpreter. Interpreters should dress in a manner that is consistent with the dignity of the proceedings of the court.

Interpreters should avoid obstructing the view of any of the individuals involved in the proceedings, but should be appropriately positioned to facilitate communication. Interpreters who use sign language or other visual modes of communication must, however, be positioned so that signs, facial expressions, and whole body movements, are visible to the person for whom they are interpreting.

Interpreters are encouraged to avoid personal or professional conduct which could discredit the court.

(Added effective January 1, 1996.)

Canon 5. Confidentiality

Interpreters shall protect the confidentiality of all privileged and other confidential information.

(Added effective January 1, 1996.)

Commentary

Interpreters must protect and uphold the confidentiality of all privileged information obtained during the course of their duties. It is especially important that the interpreter understand and uphold the attorney-client privilege that requires confidentiality with respect to any communication between attorney and client. This rule also applies to other types of privileged communications.

Interpreters must also refrain from repeating or disclosing information obtained by them in the course of their employment that may be relevant to the legal proceeding.

In the event that an interpreter becomes aware of information that indicates probable imminent harm to someone or relates to a crime being committed during the course of the proceedings, the interpreter should immediately disclose the information to the presiding

judge. If the judge is not available, the interpreter should disclose the information to an appropriate authority in the judiciary.

(Added effective January 1, 1996.)

Canon 6. Restriction of Public Comment

Interpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been engaged, even when that information is not privileged or required by law to be confidential, except to facilitate training and education.

(Added effective January 1, 1996.)

Commentary

Generally, interpreters should not discuss outside of the interpreter's official duties, interpreter assignments, persons involved or the facts of the case. However, interpreters may share information for training and educational purposes. Interpreters should only share as much information as is required to accomplish their purpose. An interpreter must not reveal privileged or confidential information.

(Added effective January 1, 1996.)

Canon 7. Scope of Practice

Interpreters shall limit themselves to interpreting or translating and shall not give legal advice, express personal opinions to individuals for whom they are interpreting, or engage in any other activities which may be construed to constitute a service other than interpreting or translating while serving as an interpreter.

(Added effective January 1, 1996.)

Commentary

Since interpreters are responsible only for enabling others to communicate, they should limit themselves to the activity of interpreting or translating only, including official functions as described in the commentary to Canon 3. Interpreters, however, may be required to initiate communications during a proceeding when they find it necessary to seek direction from the court in performing their duties. Examples of such circumstances include seeking direction from the court when unable to understand or express a word or thought, requesting speakers to moderate their rate of communication or repeat or rephrase something, correcting their own interpreting errors, or notifying the court of reservations about their ability to satisfy an assignment competently. In such instances they should make it clear that they are speaking for themselves.

An interpreter may convey legal advice from an attorney to a person only while that attorney is giving it. An interpreter should not explain the purpose or contents of forms, services, or otherwise act as counselors or advisors unless they are interpreting for someone who is acting in that official capacity. The interpreter may translate language on a form for a person who is filling out the form, but should not explain the form or its purpose for such a person.

While engaged in the function of interpreting, interpreters should not personally perform official acts that are the official responsibility of other court officials including, but not limited to, court clerks, pretrial release investigators or interviewers, or probation counselors.

(Added effective January 1, 1996.)

Canon 8. Assessing and Reporting Impediments to Performance

Interpreters shall assess at all times their ability to deliver their services. When interpreters have any reservation about their ability to satisfy an assignment competently, they shall immediately convey that reservation to the appropriate judicial authority.

(Added effective January 1, 1996.)

Commentary

If the communication mode or language variety of the non-English-speaking person cannot be readily interpreted, the interpreter should notify the appropriate judicial authority, which includes a supervisory interpreter, a judge, or another official with jurisdiction over interpreter matters.

Interpreters should notify the appropriate judicial authority of any environmental or physical limitation that impedes or hinders their ability to deliver interpreting services adequately e.g., the court room is not quiet enough for the interpreter to hear or be heard by the non-English speaker, more than one person at a time is speaking, or principals or witnesses of the court are speaking at a rate of speed that is too rapid for the interpreter to adequately interpret. Sign language interpreters must ensure that they can both see and convey the full range of visual language elements that are necessary for communication, including facial expressions and body movement, as well as hand gestures.

Interpreters should notify the judge of the need to take periodic breaks in order to maintain mental and physical alertness and prevent interpreter fatigue. Interpreters should recommend and encourage the use of team interpreting whenever necessary.

Interpreters are encouraged to make inquiries as to the nature of a case whenever possible before accepting an assignment. This enables interpreters to match more closely their professional qualifications, skills, and experience to potential assignments and more accurately assess their ability to satisfy competently those assignments.

Even competent and experienced interpreters may encounter situations where routine proceedings suddenly involve technical or specialized terminology unfamiliar to the interpreter, e.g., the unscheduled testimony of an expert witness. When such situations occur, interpreters should request a brief recess in order to familiarize themselves with the subject matter. If familiarity with the terminology requires extensive time or more intensive research, interpreters should inform the judge.

Interpreters should refrain from accepting a case if they feel the language and subject matter of that case is likely to exceed their skills or capacities. Interpreters should notify the judge if they feel unable to perform competently, due to lack of familiarity with terminology, preparation, or difficulty in understanding a witness or defendant.

(Added effective January 1, 1996.)

Canon 9. Duty to Report Ethical Violations

Interpreters shall report to the proper judicial authority any effort to impede their compliance with any law, any provision of this code, or any other official policy governing court interpreting and translating.

(Added effective January 1, 1996.)

Commentary

Because the users of interpreting services frequently misunderstand the proper role of the interpreter, they may ask or expect the interpreter to perform duties or engage in activities that run counter to the provisions of this code or other laws, rules, regulations, or policies governing court interpreters. It is incumbent upon the interpreter to explain their professional obligations to the user. If, having been apprised of these obligations, the person persists in demanding that the interpreter violate them, the interpreter should turn to a supervisory interpreter, a judge, or another official with jurisdiction over interpreter matters to resolve the situation.

(Added effective January 1, 1996.)

Canon 10. Professional Development

Interpreters shall continually strive to improve their skills and knowledge and advance the profession through activities such as professional training and education, and interaction with colleagues, and specialists in related fields.

(Added effective January 1, 1996.)

Commentary

Interpreters must continually strive to improve their interpreting skills and increase their knowledge of the languages they work in professionally, including past and current trends in technical terminology and social and regional dialects as well as their application within court proceedings.

Interpreters should keep informed of all statutes, rules of court and policies of the judiciary that govern the performance of their professional duties.

An interpreter should seek to elevate the standards of the profession through participation in workshops, professional meetings, interaction with colleagues, and reading current literature in the field.

(Added effective January 1, 1996.)

Code of Judicial Conduct

Adopted by the Supreme Court February 20, 1974
Text revised by order of September 16, 1988
to accomplish gender neutrality
With amendments received through August 1, 2000

TABLE OF CANONS

Preamble

Canon

1. A Judge Shall Uphold the Integrity and Independence of the Judiciary
2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities
3. A Judge Shall Perform the Duties of the Office Impartially and Diligently
4. A Judge Shall Conduct All Extra-Judicial Activities so as to Minimize the Risk of Conflict With Judicial Obligations
5. A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office

Application of the Code of Judicial Conduct

Commentary to the Minnesota Code of Judicial Conduct

PREAMBLE

The role of the judiciary is central to American concepts of justice and the rule of law. This Code of Judicial Conduct establishes standards for the ethical conduct of judges to reflect the responsibilities of the judicial office as a public trust and to promote confidence in our legal system. The Code and its individual Canons are designed to provide guidance to judges and candidates for judicial office and to provide a framework for the regulation of conduct through the Board on Judicial Standards. At the same time, the text embodies standards of judicial and personal conduct intended to be binding on judges and candidates for judicial office.

(Added effective January 1, 1996.)

TEXT OF CANONS

Canon 1. A Judge Shall Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and personally observe those standards in order to preserve the integrity and independence of the judiciary. The provisions of this Code should be construed and applied to further that objective.

(Amended effective January 1, 1989; amended effective January 1, 1996.)

Canon 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety In All of the Judge's Activities

A. A judge shall respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence judicial conduct or judgment. A judge shall not lend the prestige of the office

to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not hold membership in any organization that practices unlawful discrimination on the basis of race, sex, religion or national origin.

(Amended effective January 1, 1996.)

Canon 3. A Judge Shall Perform the Duties of the Office Impartially and Diligently

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge shall hear and decide promptly, efficiently and fairly matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. He or she shall be unswayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require order and decorum in all proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others dealt with in an official capacity, and shall require similar conduct of lawyers and of court personnel and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit court personnel and others subject to the judge's direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, in relation to parties, witnesses, counsel or others. This Section 3A(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or person's lawyer, the right to be heard according to law. A judge shall not initiate, permit or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with other judges and with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(8) A judge shall abstain from public comment about a pending or impending proceeding in any court, and shall require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(9) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(10) Except in the Supreme Court and the Court of Appeals, a judge shall prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recess between sessions. A judge may, however, authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration;

(b) the broadcasting, televising, recording or photographing of investitive, ceremonial or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to be depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

NOTE: See court orders following Canon 3.

B. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration and shall cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require court personnel and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge, and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments of personnel. A judge shall exercise the power of appointment impartially and on the basis of merit, avoiding nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

C. Disciplinary Responsibilities.

(1) A judge shall take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(2) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Section 3C(1) are part of the judge's judicial duties.

D. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, significant other, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other interest that could be substantially affected by the proceeding.

(d) the judge or the judge's spouse or significant other or a person within the third degree of relationship to any of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge shall keep informed about judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse, significant other and minor children wherever residing.

E. Remittal of Disqualification. A judge disqualified by the terms of Section 3D may disclose on the record the basis of the judge's disqualification, and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be incorporated in the record of the proceeding.

(Amended effective April 20, 1983; September 28, 1983; January 1, 1989; amended effective January 1, 1996.)

STATE OF MINNESOTA IN SUPREME COURT

IN RE MODIFICATION OF CANON 3A(7) OF THE MINNESOTA CODE OF JUDICIAL CONDUCT

WCCO RADIO, INC.; WCCO TELEVISION, INC.; WCCO FM, INC.; WTCN TELEVISION, INC.; UNITED TELEVISION, INC.-KMSP-TV; KTTC TELEVISION, INC.; HUBBARD BROADCASTING, INC.; NORTHWEST PUBLICATIONS, INC.; MINNEAPOLIS STAR AND TRIBUNE COMPANY, MINNESOTA PUBLIC RADIO, INC.; TWIN CITIES PUBLIC TELEVISION, INC.; MINNESOTA BROADCASTERS ASSOCIATION; MINNESOTA NEWSPAPER ASSOCIATION; RADIO AND TELEVISION NEWS DIRECTORS ASSOCIATION, MINNESOTA CHAPTER; AND SIGMA DELTA CHI/SOCIETY OF PROFESSIONAL JOURNALISTS, MINNESOTA CHAPTER, PETITIONERS

On March 18, 1981, the petitioners named above filed a petition to modify Canon 3A(7) of the Minnesota Code of Judicial Conduct to permit audio and video coverage of trial court proceedings. On August 10, 1981, after public hearing, this Court established, by order, a commission to prepare findings of fact and recommendations concerning the use of broadcast and photographic equipment in the courts of the State of Minnesota. The order designated the commission as "The Minnesota Advisory Commission on Cameras in the Courtroom", adopted rules governing the proceedings of the commission and appointed members to the commission.

On January 12, 1982, the commission filed its report containing specific findings and recommendations concerning the use of broadcast and photographic equipment in Minnesota courts and on June 4, 1982, a public hearing was held before this Court to determine whether the recommendations of the commission should or should not be adopted.

On the record, files and proceedings herein and the Court being fully advised of the premises,

IT IS ORDERED:

I. The court accepts the report of the commission and adopts its conclusion that petitioners have failed to sustain the burden of showing that they are entitled to the relief requested in their petition. The petition, therefore, except as hereinafter provided, is denied.

II. The court believes, however, that further study, including monitoring of programs in other jurisdictions, is advisable, and, to that end, adopts the recommendation of the majority of the commission that audio and video coverage of trial court proceedings in this state be permitted on a restricted experimental basis for a reasonable period of time.

III. Compliance with Canon 3A(7) is, therefore, waived for a period of 2 years from the date of this order in those trials where audio and video coverage is implemented on an experimental basis as follows:

1. Subject to further order of this Court, an experimental program for audio and video coverage of trial court proceedings in this state is established in accordance with the rules provided in this order and in the Standards of Conduct and Technology attached hereto as Exhibit A and made a part of this order.

2. Participation by the court and the parties in this experimental program shall be voluntary. Consequently, there shall be no audio or video coverage of any trial court proceeding without the consent of the trial judge and all parties in writing or made on the record prior to the commencement of the trial.

3. There shall be no audio or video coverage of jurors at any time during the trial, including *voir dire*.

4. There shall be no audio or video coverage of any witness who objects thereto in writing or on the record before testifying.

5. Audio or video coverage of judicial proceedings shall be limited to proceedings conducted within the courtroom, and shall not extend to activities or events substantially related to judicial proceedings which occur in other areas of the court building.

6. There shall be no audio or video coverage within the courtroom during recesses or at any other time the trial judge is not present and presiding.

7. During or preceding a jury trial, there shall be no audio or video coverage of hearings which take place outside the presence of the jury. Without limiting the generality of the foregoing sentence, such hearings would include those to determine the admissibility of evidence, and those to determine various motions, such as motions to suppress evidence, for judgment of acquittal, *in limine* and to dismiss.

8. There shall be no audio or video coverage in cases involving child custody, marriage dissolution, juvenile proceedings, motions to suppress evidence, police informants, relocated witnesses, sex crimes, trade secrets, and undercover agents.

9. No ruling of the trial court relating to the implementation or management of this experimental program shall be appealable until the trial has been completed, and then only by a party.

10. In trials where this experimental program is used, the judges and lawyers involved are directed, and media personnel are requested, to report to this Court their impressions, particularly whether or not there were any difficulties which created special burdens for the presiding judge and any special problems with respect to counsel, witnesses, litigants, jurors or media representatives.

Dated: April 18, 1983

BY THE COURT

-s-Douglas K. Amdahl
Chief Justice

Revisor's Note: See Canon 3A(10).

EXHIBIT A

STANDARDS OF CONDUCT AND TECHNOLOGY GOVERNING STILL PHOTOGRAPHY, ELECTRONIC AND BROADCAST COVERAGE OF JUDICIAL PROCEEDINGS

1. Equipment and personnel.

(a) Not more than one portable television camera [film camera—16 mm sound on film (self blimped) or videotape electronic camera], operated by not more than one person, shall be permitted in any trial court proceeding.

(b) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in any trial court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in any trial court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court. If no technically suitable audio system exists in the court, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the trial judge.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the trial judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the trial judge shall exclude from a proceeding all media personnel who have contested the pooling arrangement.

2. Sound and light.

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Excepting modifications and additions made pursuant to Paragraph 5 below, no artificial, mobile lighting device of any kind shall be employed with the television camera.

(b) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such still camera equipment shall produce no greater sound or light than a 35 mm Leica "M" Series Rangefinder camera, and no artificial lighting device of any kind shall be employed in connection with a still camera.

(c) It shall be the affirmative duty of media personnel to demonstrate to the trial judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria enunciated herein. A failure to demonstrate that these criteria have been met for specific equipment shall preclude its use in any proceeding. If these Guidelines should include a list of equipment approved for use, such equipment need not be the object of such a demonstration.

3. Location of equipment and personnel.

(a) Television camera equipment shall be positioned in such location in the court as shall be designated by the trial judge. The area designated shall provide reasonable access to coverage. When areas which permit reasonable access to coverage are provided, all television camera and audio equipment shall be located in an area remote from the court.

(b) A still camera photographer shall position himself or herself in such location in the court as shall be designated by the trial judge. The area designated shall provide reasonable access to coverage. Still camera photographers shall assume a fixed position within the designated area and, once a photographer has established himself or herself in a shooting position, he or she shall act so as not to call attention to himself or

herself through distracting movement. Still camera photographers shall not be permitted to move about in order to obtain photographs of court proceedings.

(c) Broadcast media representatives shall not move about the court facility while proceedings are in session.

4. Movement of equipment during proceedings.

News media photographic or audio equipment shall not be placed in, or removed from, the court except prior to commencement or after adjournment of proceedings each day, or during a recess. Microphones or taping equipment, once positioned as required by 1(c) above, shall not be moved from their position during the pendency of the proceeding. Neither television film magazines nor still camera film or lenses shall be changed within a court except during a recess in the proceedings.

5. Courtroom light sources.

When necessary to allow news coverage to proceed, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions do not produce distracting light and are installed and maintained without public expense. Such modifications or additions are to be presented to the trial judge for review prior to their implementation.

6. Conferences of counsel.

To protect the attorney-client privilege and the effective right to counsel, there shall be no video or audio pickup or broadcast of the conferences which occur in a court between attorneys and their client, co-counsel of a client, opposing counsel, or between counsel and the trial judge held at the bench. In addition, there shall be no video pickup or broadcast of work papers of such persons.

7. Impermissible use of media material.

None of the film, videotape, still photographs or audio reproductions developed during, or by virtue of, coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceedings.

NOTE: Order dated April 18, 1983, established experimental program for a period of two years; Order dated August 21, 1985, established experimental program on terms and conditions provided in that Order until April 18, 1987; experimental program originally authorized by April 18, 1983 Order reinstated by Order dated May 22, 1989, to continue in effect until January 1, 1994; reinstated by Order dated January 11, 1996.

STATE OF MINNESOTA IN SUPREME COURT

AMENDED ORDER PERMITTING AUDIO AND VIDEO COVERAGE OF APPELLATE COURT PROCEEDINGS

On January 27, 1978, upon petition of the Minnesota State Bar Association Joint Bar, Press, Radio and Television Committee, this court made its order waiving and suspending, at the discretion of the Court, for experimental purposes, Canon 3, Paragraph A.(7), Code of Judicial Conduct. After more than five years of experimentation during which time no problems other than minor mechanical problems have developed, the Court has determined that the experimental modification of Canon 3, Paragraph A.(7) should be made permanent and should be expanded to include the Court of Appeals. Therefore,

IT IS THEREFORE ORDERED:

1. That judicial proceedings in the Supreme Court and in the Court of Appeals are excepted from the provisions of Canon 3, Paragraph A.(7), Code of Judicial Conduct.

2. That Canon 3, Paragraph A.(7), Code of Judicial Conduct be, and hereby is, amended to read:

Except in the Supreme Court and the Court of Appeals, a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recess between sessions. A judge may, however, authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to be depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

3. That audio or video coverage in the Supreme Court and the Court of Appeals be subject to the following rules:

(a) Unless notice is waived by the Chief Justice of the Supreme Court or the Chief Judge of the Court of Appeals, notice of intent to cover court proceedings by either audio or video means shall be given by the media to the Clerk of the Appellate Courts at least 24 hours prior to the time of the intended coverage.*

(b) Cameramen, technicians and photographers covering a proceeding shall avoid activity which might distract participants or impair the dignity of the proceedings; shall remain seated within the restricted areas designated by the Court, shall observe the customs of the Court; shall conduct themselves in keeping with courtroom decorum; and shall not dress in a manner which sets them apart unduly from the participants in the proceeding.

(c) All broadcast and photographic coverage shall be on a pool basis, the arrangements for which must be made by the pooling parties in advance of the hearing. Not more than one (1) ENG camera producing the single video pool-feed shall be

permitted in the courtroom. Not more than two (2) still-photographic cameras shall be permitted in the courtroom at any one time. Motor-driven still cameras shall not be used.

(d) Exact locations for all camera and audio equipment within the courtroom shall be determined by the Court. All equipment shall be in place and tested 15 minutes in advance of the time the Court is called to order and shall be unobtrusive. All wiring, until made permanent, shall be safely and securely taped to the floor along the walls.

(e) Only existing courtroom lighting shall be used.

Dated: April 20, 1983; amended September 28, 1983

BY THE COURT

-s-Douglas K. Amdahl
Chief Justice

NOTE: Electronic and print media are monthly notified by the Supreme Court Commissioner that anyone interested in video or audio tape recording a specific case in the Supreme Court must send a written request to the Clerk of the Appellate Courts, Room 245, Minnesota Judicial Center, 25 Constitution Avenue, St. Paul, MN 55155; a request which must be received at least two working days prior to the date scheduled for the argument.

STATE OF MINNESOTA IN SUPREME COURT

VIDEOTAPED RECORDS OF COURT PROCEEDINGS IN THE THIRD, FIFTH, AND SEVENTH JUDICIAL DISTRICTS

ORDER

WHEREAS, the Minnesota Court Record Study Committee recommended a pilot project using video recording to create the court record, and

WHEREAS, the State Court Administrator was directed by 1989 Laws of Minnesota, Chapter 335, Article I, Section 3, Subdivision 5, to install and operate video taping equipment in at least three district courts and the court of appeals, and a one-time appropriation of \$204,000 was provided for installation and operation, and

WHEREAS, it is in the best interests of the administration of justice to investigate alternative court reporting technologies,

NOW, THEREFORE, IT IS ORDERED:

1. The Third, Fifth, and Seventh Judicial Districts are authorized, until further order of this Court, to conduct an experimental program in one courtroom in each district which will use videotaped recordings to create the official record of the case.

2. Videotaped recording of the official court record as provided in this experimental program is excepted from the provisions of Canon 3A(7) of the Minnesota Code of Judicial Conduct, as modified by the order (C7-81-300) of this Court dated May 22, 1989, except as provided in paragraph 3, entitled Media made a part of this order.

IT IS FURTHER ORDERED the following guidelines shall apply to this experimental program:

1. Record: The official record of trial court proceedings shall be two videotape recordings, recorded simultaneously, of the court proceedings. Upon filing of a notice of appeal, one of the two videotape recordings shall be filed with the Clerk of Appellate Courts and certified by the court administrator as part of the record on appeal. The second videotape recording shall be retained by the court administrator. If only a portion of the videotape is used as the record it shall be filed with the Clerk of Appellate Courts and certified by the court administrator as part of the record on appeal.

2. Trial Courts:

(a) The trial judge shall be responsible for ensuring, through routine checks of the videotape system by a suitably trained person, that the videotape system is operating according to specifications.

(b) The trial judge shall, at the commencement of proceedings, state for the record (1) the proceedings are being recorded on videotape, (2) jurors will not be photographed, and (3) no party or witness may object to such recording under the provisions of the order (C7-81-300) dated May 22, 1989, but that the videotaped recordings shall not be available to the news media or the public.

(c) The trial judge or the court administrator shall make available to each attorney who practices in the judge's court a copy of this order.

(d) The trial judge shall be responsible for keeping a proper index of proceedings that have been videotaped, including a list of witnesses and exhibits.

3. Media: Film or electronic media coverage in the pilot project courts, if granted, shall be governed by the guidelines authorized by this Court by order of April 18, 1983, and reinstated by this Court by order of May 22, 1989. For the purposes of this pilot study, videotaped recordings of trial court proceedings shall not be available to the news media or the public. Members of the news media or the public wishing to

review the record of a court proceeding shall contact the court administrator to arrange for the preparation of a printed transcript.

4. Appeals:

(a) The court administrator shall arrange for the preparation of duplicate copies of videotapes for use by counsel in preparing an appeal.

(b) Court of Appeals. For the purposes of this experiment videotaped recordings shall be used instead of printed transcripts when a case is on appeal before the Court of Appeals, subject to the other provisions of this order.

(1) A party may, at its option, prepare and file as part of the supplemental record (Minnesota Rules of Civil Appellate Procedure, Rule 130.03) a printed transcription of portions of the videotape recording. The printed transcriptions shall contain only those parts of the videotape recording that support the specific issues or contentions raised in a brief on appeal, or that relate to the question of whether an alleged error was properly preserved for appellate review. This transcription and index contained in the supplemental record shall not exceed 50 pages.

(2) Printed transcripts of videotape recordings must contain, on each page, a reference to the number of the videotape and the month, day, year, hour, minute, and second at which the reference begins as recorded on the videotape, e.g., (Tape No. 1, 2-19-88, 14:22:11). References in a brief to a segment of the videotape recordings must conform to the same documentation format, so as to meet the requirements of Minnesota Rules of Civil Appellate Procedure, Rule 128.03.

(3) The Court of Appeals Chief Judge may order the appellant to arrange for the printed transcription of any part of the videotape that is deemed necessary. The cost of transcription shall be initially paid by the appellant.

(4) When printed transcripts are prepared, a court reporter or recorder need not certify attendance at the proceedings being transcribed from the videotaped record, but need only certify that the transcript represents the complete, true, and correct rendition of the videotape of the proceedings as recorded.

(c) Supreme Court. When a case is on appeal before the Supreme Court, the printed transcript of the proceedings must be prepared from the videotaped recording by the appellant.

5. State Court Administrator: The State Court Administrator shall provide assistance in implementation of the pilot projects, and shall conduct an evaluation of the experimental program. The pilot courts shall cooperate with the State Court Administrator on these projects. The administrator shall file with the Supreme Court any interim reports, and a final report which shall be due as the result of the pilot study by July 1, 1991.

Dated: November 17, 1989

BY THE COURT

-s-Lawrence R. Yetka
Associate Justice

STATE OF MINNESOTA IN SUPREME COURT

IN RE VIDEOTAPE/CIC PILOT PROJECT EXTENSION

WHEREAS, the Supreme Court in an Order dated November 17, 1989, authorized the installation of videotaped court reporting systems in the Third, Fifth, and Seventh Judicial Districts and a Computer Integrated Courtroom in the Second Judicial District, and directed the State Court Administrator to file a final evaluation report no later than July 1, 1991, and

WHEREAS, the Videotape/CIC Pilot Project Evaluation Committee, appointed by this Court in an order dated July 17, 1990, has requested an extension of the pilot project.

NOW, THEREFORE, IT IS ORDERED that the Videotape/CIC Pilot Project Evaluation Committee shall submit its final report to the State Court Administrator on or before January 1, 1992.

Dated: October 11, 1990

STATE OF MINNESOTA IN SUPREME COURT

INTERACTIVE AUDIO-VIDEO COMMUNICATIONS IN THE FOURTH JUDICIAL DISTRICT - MENTAL HEALTH DIVISION - *PRICE AND JARVIS PROCEEDINGS*

WHEREAS, the Supreme Court in an Order dated March 22, 1990, authorized on an experimental basis, the use of interactive audio-video communications in the Mental Health Division of the Fourth Judicial District for receiving the testimony of petitioner's physicians from the Anoka-Metro Regional Treatment Center (AMRTC) in proceedings pursuant to *Jarvis v. Levine*, 418 N.W.2d 139 (Minn.1988); and *Price v. Sheppard*, 307 Minn. 250, 239 N.W.2d 905 (Minn.1976); and,

WHEREAS, the Evaluation Committee for the experimental project, in its final report to the Court filed on December 31, 1990, recommended the continuation of the interactive audio-video communication technology for *Jarvis* and *Price* hearings for Hennepin County patients at the AMRTC and the authorization of two-way television for similar hearings for Hennepin County patients residing at the regional treatment centers in Brainerd, Fergus Falls, Moose Lake, St. Peter and Willmar,

NOW, THEREFORE, IT IS ORDERED:

1. The Mental Health Division of the Fourth Judicial District is authorized to conduct *Jarvis* and *Price* hearings using interactive audio-video communications to receive the testimony of physicians who will be physically located at a regional treatment center.

2. The use of interactive audio-video communications in this program is excepted from the provisions of Canon 3A(7) of the Minnesota Code of Judicial Conduct.

Revisor's Note: See Canon 3A(10).

IT IS FURTHER ORDERED that the following guidelines will apply:

1. Transmission. The hearings will use interactive audio-video communication between a courtroom in the Hennepin County Government Center and one secured witness room at a regional treatment center. The transmission will be either point to point microwave or digital compressed video via land line. The transmission path will be secured against electronic eavesdropping.

2. Equipment in the Courtroom. The courtroom and witness rooms shall be equipped with high-quality audio and video equipment that will: (a) allow the physician at the regional treatment center to clearly see, hear and communicate with the courtroom participants; (b) allow the judge or referee, the court reporter, the respondent's attorney, the petitioner's attorney, and a person in the witness stand to clearly see, hear and communicate with the physician; and, (c) allow spectators to observe the testimony of the physician.

A separate telephone will be provided in the courtroom to assure a back-up communication path between the courtroom and the witness room at the regional treatment center. A separate telephone will also be provided in the witness room at the regional treatment center for the same purpose.

One facsimile machine will be provided in the courtroom and one at the regional treatment center witness room for document transmittal during the hearing.

There will be no audio or video recording equipment attached to any part of this communication system.

3. Record. The court proceedings will be recorded by the court reporter in the customary manner.

4. Medical Records. The original medical records shall be brought to the hearing and copies shall be provided to the physicians.

5. Operation of the Equipment. All equipment will be tested to assure proper functioning prior to each court hearing by suitably trained Department of Human

Services personnel or Fourth Judicial District Mental Health Division Staff. The test will also consist of establishing audio-visual communication between the courtroom and the regional treatment center witness room prior to the scheduled time of a hearing. The tests should be done at least fifteen minutes prior to the hearing time.

6. Court Hearing.

(a) The court or the court administrator shall, upon the scheduling of a hearing, provide each attorney and guardian ad litem who may appear in the court a copy of this order, so as to protect the right of respondent to object under paragraph (f) below.

(b) At the commencement of proceedings, the judge or referee will ensure that contact is made with the physician at the regional treatment center and that the physician is promptly and properly administered an oath. There shall be no person other than the physician in the witness room during the physician's testimony.

(c) The audio-video communication link with the regional treatment center witness room will be maintained from the swearing in of the treatment center physician until the conclusion of the hearing, or termination of the communication link by the judge or referee.

(d) The equipment will allow the physician at the regional treatment center to hear objections made to testimony. However, in the event the physician at the regional treatment center speaks or continues to speak after an objection is made, the judge or referee will be able to interrupt the testimony of that physician without terminating the communication link.

(e) To protect the attorney-client privilege and the effective right to counsel there will be no audio transmission of the conferences which occur in court between attorneys and their clients, between opposing counsel, or between counsel and the trial judge at the bench.

(f) A respondent may object to the use of audio-video communication for receiving the testimony of the petitioner's physician. The objection must be made at least five days, excluding weekends or holidays, prior to the scheduled hearing. Argument on respondent's motion may be held by telephone conference call. The court may grant respondent's motion upon showing that the use of audio-video communication for receiving the testimony of the petitioner's physician will hinder ascertainment of the truth or result in unfair prejudice to respondent. The court must notify all parties of its ruling 72 hours prior to the time of the scheduled hearing.

(g) This order does not prohibit conducting *Jarvis* and *Price* hearings in the traditional manner when all parties stipulate that it is in the best interests of justice to do so.

7. Training. DHS will train judges, referees, physicians, court personnel, respondents' attorneys, guardians ad litem, and petitioner's attorneys in the proper use of the audio-video equipment.

8. Security. The audio-video communication system will be designed so that the establishment of communications with the regional treatment center witness room can only be initiated from the Hennepin County Government Center courtroom.

9. Evaluation. The Evaluation Committee, appointed by Order of this Court, dated May 10, 1990, shall continue to monitor the use of interactive audio-visual communications described in this order. The Evaluation Committee shall address the quality of transmission, ease of use of the equipment, reliability of the equipment and transmission path, any disruptions to the proceedings, the ability to assess physician demeanor, and whether there is prejudice to any party.

The Evaluation Committee shall file with the Supreme Court a report evaluating the expanded use of this audio-video technology on or before July 1, 1993.

Dated: April 8, 1991

**STATE OF MINNESOTA
IN SUPREME COURT**

C7-81-300

**IN RE MODIFICATION OF SECTION 3A(10) OF THE
MINNESOTA CODE OF JUDICIAL CONDUCT**

WHEREAS, by order of May 22, 1989, this Court modified Canon 3A(7) of the Minnesota Code of Judicial Conduct by reinstating the experimental program for audio and video coverage of trial court proceedings until January 1, 1994 or until further order of this Court; and

WHEREAS, by order of November 1, 1995, this Court renumbered Canon 3A(7) as Section 3A(10), effective January 1, 1996, and this renumbering has created confusion regarding the status of the experimental program; and

WHEREAS, this Court desires to encourage experimental audio and visual coverage of trial court proceedings in accordance with the rules provided in the order of April 18, 1983;

NOW, THEREFORE, IT IS HEREBY ORDERED that the experimental program originally authorized by this Court by order of April 18, 1983, be, and the same is, reinstated until further order of this Court.

Dated: January 11, 1996

BY THE COURT

-s-A. M. Keith
Chief Justice

Canon 4. A Judge Shall Conduct All Extra-Judicial Activities so as to Minimize the Risk of Conflict With Judicial Obligations

A. Extra-judicial Activities in General. A judge shall conduct all extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

B. Avocational Activities. A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice, and non-legal activities, including the arts, sports and other social and recreational activities, subject to the requirements of this Code.

C. Governmental, Civic or Charitable Activities.

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(3) A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations and the other requirements of this Code:

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization:

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(b) A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, or use or permit the use of the prestige of judicial office for that purpose, but may be listed as an officer, director or trustee of such an organization. A judge shall not be a speaker or the guest of honor at an organization's fund raising events, but may attend such events. A judge may participate in the management and investment of an organization's funds so long as it does not conflict with other provisions of the Code.

D. Financial Activities.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except for:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use; or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift for a special occasion from a relative or friend, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3D;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan only if the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds \$150, the judge reports it in the same manner as the judge reports compensation in Section 4H.

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, conservator, attorney in fact or other fiduciary, except for the estate, trust, conservator or person of a family member, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, conservatorship or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law. A retired judge may participate as mediator or arbitrator if:

(1) the judge does not participate during the period of any judicial assignment,

(2) the judge is disqualified from mediation and arbitration in matters in which the judge served as judge, and is disqualified as judge from matters in which the judge participated as mediator or arbitrator, unless all parties to the proceeding consent after consultation, and

(3) the participation does not reflect adversely on the judge's impartiality.

G. Practice of Law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family; but may not act as advocate or negotiator nor make an appearance as counsel for a member of the judge's family in a legal matter.

H. Compensation, Reimbursement and Reporting.

(1) A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(2) A judge shall report the date, place, and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. Income from investments, whether in real or personal property and other sources where the judge does not render service in exchange for the income is not extra-judicial compensation to the judge. This report shall be made annually, on or before the first day of May each year, and be filed as a public document in the office of the State Court Administrator.

I. Disclosure. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3D and 3E, or as otherwise required by law.

(Amended effective January 1, 1989; amended effective January 1, 1996.)

Canon 5. A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office

A. In General.

Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office. MS 204B.06 Subd 6.

(1) Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) act as a leader or hold any office in a political organization; identify themselves as members of a political organization, except as necessary to vote in an election;

(b) publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) attend political gatherings; or seek, accept or use endorsements from a political organization; or

(e) solicit funds for or pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

(2) A judge shall resign the judicial office on becoming a candidate either in a primary or in a general election for a non-judicial office, except that a judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if the judge is otherwise permitted by law to do so.

(3) A candidate for a judicial office, including an incumbent judge:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5B(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent; and

(ii) by words or conduct manifest bias or prejudice inappropriate to judicial office.

(e) may respond to statements made during a campaign for judicial office within the limitations of Section 5A(3)(d).

B. Judges and Candidates For Public Election.

(1) A judge or a candidate for election to judicial office may, except as prohibited by law,

(a) speak to gatherings, other than political organization gatherings, on his or her own behalf;

(b) appear in newspaper, television and other media advertisements supporting his or her candidacy; and

(c) distribute pamphlets and other promotional campaign literature supporting his or her candidacy.

(2) A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

C. Incumbent Judges. A judge shall not engage in any political activity except (1) as authorized under any other Section of this Code, (2) on behalf of measures to improve the law, the legal system or the administration of justice, or (3) as expressly authorized by law.

D. Political Organization. For purposes of Canon 5 the term political organization denotes a political party organization.

E. Applicability. Canon 1, Canon 2(A), and Canon 5 generally applies to all incumbent judges and judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to Rule 8.2 of the Minnesota Rules of Professional Conduct.

(Amended effective January 1, 1996; amended effective January 1, 1998.)

APPLICATION OF THE CODE OF JUDICIAL CONDUCT

A. Full-Time Judges. Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a full-time referee, special master or magistrate, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.

B. Retired Judge. A retired judge who by law is not permitted to practice law is not required to comply:

- (1) except while serving as a judge, with Section 4F; and
- (2) at any time with Section 4E.

C. Part-Time Judge. A part-time judge:

- (1) is not required to comply
 - (a) except while serving as a judge, with Section 3A(9);
 - (b) at any time, with Sections 4C(2), 4C(3)(a), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(1), and 5C.
- (2) shall not practice law in the division of the court on which the judge serves and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

D. Time for Compliance. A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(2), 4D(3) and 4E and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

(Added effective January 1, 1996.)

COMMENTARY TO THE MINNESOTA CODE OF JUDICIAL CONDUCT

Special Report of the Advisory Committee to Review the American Bar Association Model Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards

November 22, 1995

PREFACE

This report explains certain provisions of the Code of Judicial Conduct adopted by the Minnesota Supreme Court effective January 1, 1996. These comments represent the views of the Advisory Committee only and should not be viewed as official interpretations of the Minnesota Supreme Court. The Advisory Committee hopes that this report will provide guidance with respect to the purpose and meaning of the Code of Judicial Conduct.

Among the changes proposed by the Advisory Committee, but not adopted by the Court, was the addition of a terminology section defining certain terms used in the Code. The Advisory Committee felt that it would be useful to preserve its attempt to define certain terms, and these definitions are set forth at the beginning of the comments to each Canon in which the terms are used. The definitions include a reference to specific Sections within each Canon in which the terms are used. For example, the term "law" denotes court rules as well as statutes, constitutional provisions and decisional law. See Sections 2A, 3A(2), 3A(7), 4B, 4C, 4D(5), 4F, 4I, 5A(2), 5B(1) and 5C.

The Advisory Committee gratefully acknowledges the efforts of the American Bar Association in developing the 1990 Model Code of Judicial Conduct. Interpretations of the Model Code as adopted in other jurisdictions may also provide guidance with respect to the purpose and meaning of the Minnesota Code of Judicial Conduct.

COMMENTS - CANON 1

Section 1A. Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

COMMENTS - CANON 2

Section 2A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety, applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.

Section 2B. Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 5 regarding use of a judge's name in political activities.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when subpoenaed.

COMMENTS - CANON 3

Terminology: “Court personnel” does not include the lawyers in a proceeding before a judge. See Section 3A(5), 3A(7)(c) and 3A(8).

Terminology: “Economic interest” denotes ownership of a legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge’s spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

See Sections 3D(1)(c) and 3D(2).

Terminology: “Fiduciary” includes such relationships as executor, administrator, conservator, trustee, and guardian. See Sections 3D(1)(c), 3D(2) and 4E.

Terminology: “Member of the judge’s family residing in the judge’s household” denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge’s family, who resides in the judge’s household. See Sections 3D(1) and 4D(5).

Terminology: “Nonpublic information” denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, pre-sentencing reports, dependency cases or psychiatric reports. See Section 3A(11).

Terminology: “Require.” The rules prescribing that a judge “require” certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term “require” in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge’s direction and control. See Section 3A(3), 3A(4), 3A(6), 3A(8) and 3B(2).

Terminology: “Third degree of relationship.” The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece. See Section 3D(1)(d).

Section 3A(1). Minnesota Statutes require that all questions of fact and law, and all motions and matters submitted to the district court and court of appeals shall be disposed of and the decision filed within 90 days, with certain limited exceptions. Minnesota Statutes, sections 546.27, subdivision 1; and 480A.08, subdivision 3. This 90 day rule is an outside limit; cases should be decided before the 90 days expire, whenever possible. Failure to abide by the statutory 90 day rule may constitute grounds for disciplinary action.

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without

unnecessary cost or delay. Containing cost while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

Section 3A(4). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

Section 3A(5). A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Section 3A(7). The proscription against *ex parte* communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3A(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain *ex parte* communication is approved by Section 3A(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Section 3A(7) are clearly met. A judge must disclose to all parties all *ex parte* communications described in Sections 3A(7)(a) and 3A(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3A(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

Section 3A(8). The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must

not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 3.b of the Minnesota Rules of Professional Conduct.

Section 3A(9). Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

Section 3B(4). Appointees of a judge include neutral experts, assigned counsel, officials such as referees, commissioners, special masters, receivers, conservators, and guardians and personnel such as clerks, secretaries, court reporters and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3B(4).

Section 3C(1). Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate disciplinary authority or other agency or body.

Section 3D(1). Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3D(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

Section 3D(1)(a). Personal relationships of a judge with lawyers appearing in any matter, such as a former partner, close personal friend, or other relationship which may give the appearance of impropriety, conflict of interest, or favoritism shall be disclosed to all parties at the commencement of any proceeding. While such relationships do not require automatic disqualification, disclosure is required.

Section 3D(1)(b). A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3D(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Section 3D(1)(d). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3D(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3D(1)(d)(iii) may require the judge's disqualification. In most cases, the fact that a judge's spouse is a firm partner requires the judge's disqualification.

Section 3E. A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been

consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

COMMENTS - CANON 4

Terminology: “Fiduciary” includes such relationships as executor, administrator, conservator, trustee, and guardian. See Sections 3D(1)(c), 3D(2) and 4E.

Terminology: “Family” denotes a spouse, significant other, child, grandchild, parent, grandparent, or other relative or person with whom the specified individual maintains a close familial relationship. See Sections 4D(2), 4E, 4G and 5A(3)(a).

Terminology: “Member of the judge’s family residing in the judge’s household” denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge’s family, who resides in the judge’s household. See Sections 3D(1) and 4D(5).

Section 4A. Complete separation of a judge from extra-judicial activities is neither possible nor wise. A judge should not become isolated from the community in which the judge lives.

Expressions of bias or prejudice by a judge, even outside judicial activities, may cast reasonable doubt on the judge’s capacity to act impartially. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. See Section 2C and accompanying Commentary.

Section 4B. As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

In this and other Sections of Canon 4, the phrase “subject to the requirements of this Code” is used, notably in connection with a judge’s governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

Section 4C(1). See Section 2B regarding the obligation to avoid improper influence.

Section 4C(2). Section 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system or administration of justice as authorized by Section 4C(3). The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

Section 4C(2) does not govern a judge’s service in a nongovernmental position. See Section 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. For example, service on the board of a public educational institution, unless it were a law school, would be prohibited under Section 4C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Section 4C(3).

Section 4C(3). Section 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Section 4C(2).

See Commentary to Section 4B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." As an example of the meaning of the phrase, a judge permitted by Section 4C(3) to serve on the board of a fraternal institution may be prohibited from such service by Sections 2C or 4A if the institution practices unlawful discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Section 4C. For example, a judge is prohibited by Section 4G from serving as a legal advisor to a civic or charitable organization.

Section 4C(3)(a). The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

Section 4C(3)(b). A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice or a nonprofit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

Section 4D(1). The Time for Compliance provision of this Code (Application, Section D) postpones the time for compliance with certain provisions of this Section in some cases.

When a judge acquires in a judicial capacity information, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(11).

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of judge with law firms appearing before the judge, see Commentary to Section 3E(1) relating to disqualification.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2B against the misuse of the prestige of judicial office. In addition, a judge

must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1. See Commentary for Section 4B regarding use of the phrase "subject to the requirements of this Code."

Section 4D(2). This Section provides that, subject to the requirements of this Code, a judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge's family, and investment owned jointly by the judge and members of the judge's family.

Section 4D(5). Section 4D(5) does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 5.

Because a gift, bequest, favor or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

Section 4D(5)(a). Acceptance of an invitation to a law-related function is governed by Section 4D(5)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 4D(5)(h).

A judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this Code. See Sections 4A(1) and 2B.

Section 4D(5)(d). A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Section 4D(5)(e).

Section 4D(5)(h). Section 4D(5)(h) prohibits judges from accepting gifts, favors, bequests or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

Section 4E. The Time for Compliance provision of this Code (Application, Section D) postpones the time for compliance with certain provisions of this Section in some cases.

The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Section 4D(4).

Section 4F. Section 4F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

Section 4G. This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Section 2B.

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

A retired judge who serves or intends to serve as a judge shall not practice law while available for judicial assignment, but may serve as an arbitrator or mediator as

provided in Section 4F. A roster of retired judges available for assignment is maintained by the Supreme Court.

Section 4H. See Section 4D(5) regarding reporting of gifts, bequests and loans.

The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.

Section 4I. Section 3D requires a judge to disqualify himself or herself in any proceeding in which the judge has an economic interest. Section 4H requires a judge to report all compensation the judge received for activities outside judicial office. A judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties.

COMMENTS - CANON 5

Terminology: "Candidate" is a person seeking selection for or retention in judicial office by election. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election to non-judicial office. See Sections 5A, 5B and 5D.

Terminology: "Election" includes primary and general elections; it includes partisan elections, nonpartisan elections and retention elections. See Section 5.

Terminology: "Family" denotes a spouse, significant other, child, grandchild, parent, grandparent, or other relative or person with whom the specified individual maintains a close familial relationship. See Sections 4D(2), 4E, 4G and 5A(3)(a).

Terminology: "Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office. See Section 5A(1).

Section 5A(1). A judge or candidate for judicial office retains the right to participate in the political process as a voter.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited by Section 5A(1) from making the facts public.

Section 5A(1)(a) does not prohibit a candidate for elective judicial office from retaining during candidacy a public office such as county prosecutor, which is not "an office in a political organization."

Section 5A(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office. A judge may respond to official inquiries concerning a person being considered for a judgeship. See Section 2B and Commentary.

A candidate does not publicly endorse another candidate for public office by having that candidate's name on the same ticket. Committees of lawyers commonly endorse groups of judges, and this is not prohibited.

Section 5A(3)(a). Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

Section 5B(2). Section 5B(2) permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions. Campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E. A candidate's committees have a duty not to disclose to the candidate the identity of campaign contributors.

Campaign committees established under Section 5B(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fund-raising, to the extent possible.

Section 5B(2) does not prohibit a candidate from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of this Code, from responding to a request for information from any organization.

Section 5C. Neither Section 5C nor any other section of this Code prohibits a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government. With respect to a judge's activity on behalf of measures to improve the law, the legal system and the administration of justice, see Commentary to Section 4B and Section 4C(1) and its Commentary.

COMMENTS - APPLICATION SECTION

Terminology: "Judge" denotes anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a referee, special master or magistrate.

Application Section C. When a person who has been a part-time judge is no longer a part-time judge (no longer accepts appointments), that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to Rule 1.12(a) of the Minnesota Rules of Professional Conduct. Application Section C is intended to encompass conciliation court referees appointed pursuant to law (see Minnesota Statutes, section 491A.03, subdivision 1) and special masters.

Application Section D. If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 4D(3), continue in that activity for a reasonable period but in no event longer than one year.

Rules of Board on Judicial Standards

Adopted Effective July 1, 1986

Revised Effective January 1, 1990

With amendments received through August 1, 2000

TABLE OF RULES

Definitions.

Rule

1. Organization of Board.
 - (a) Appointment of Members.
 - (b) Term of Office.
 - (c) Vacancy.
 - (d) Duties and Responsibilities of Executive Secretary.
 - (e) Quorum and Chairperson.
 - (f) Meetings of the Board.
 - (g) Annual Report.
 - (h) Expenses of the Board and Staff.
2. Jurisdiction and Powers of Board.
 - (a) Powers in General.
 - (b) Jurisdiction Over Full-Time and Part-Time Judges.
 - (c) Jurisdiction Over Former Judge.
 - (d) Subpoena and Depositions.
 - (e) Impeachment.
3. Immunity; Privilege.
4. Grounds for Discipline.
 - (a) Grounds for Discipline Shall Include.
 - (b) Disposition of Criminal Charges.
 - (c) Proceedings Not Substitute for Appeal.
5. Confidentiality.
 - (a) Before Formal Complaint and Response.
 - (b) After Formal Complaint and Response.
 - (c) Work Product.
 - (d) Public Statements by Board.
 - (e) Disclosure for Judicial Selection, Appointment, Election or Assignment.
 - (f) Waiver of Confidentiality.
6. Procedure Prior to Sufficient Cause Determination.
 - (a) Initiation of Inquiry.
 - (b) Preliminary Evaluation.
 - (c) Investigation; Discretionary Notice.
 - (d) Sufficient Cause Determination.
 - (e) Insufficient Cause to Proceed.
 - (f) Dispositions in Lieu of Further Proceedings.
 - (g) Objection to Dispositions.
 - (h) Representation by Counsel.
- 6Z. Procedure for Conduct Occurring Prior to Assumption of Judicial Office.
 - (a) Complaint; Notice.
 - (b) Investigation.
 - (c) Authority of Board on Judicial Standards to Proceed Directly to Public Charges.
 - (d) Record of Lawyer Discipline Admissible in Judicial Disciplinary Proceeding.
7. Procedure Where Sufficient Cause Found.
 - (a) Statement of Charges.

- (b) Termination After Response.
 - (c) Quorum.
- 8. Formal Complaint and Notice.
 - (a) Formal Complaint.
 - (b) Notice of Hearing.
- 9. Discovery.
 - (a) Witnesses; Depositions.
 - (b) Other Evidence.
 - (c) Exculpatory Evidence.
 - (d) Duty of Supplementation.
 - (e) Completion of Discovery.
 - (f) Failure to Disclose.
 - (g) Resolution of Disputes.
 - (h) Civil Rules Not Applicable.
- 10. Formal Hearing.
 - (a) Factfinder.
 - (b) Rules of Evidence and Due Process.
 - (c) Presentation: Burden of Proof; Cross-Examination; Recording.
 - (d) Amendments.
- 11. Procedure Following Formal Hearing.
 - (a) Submission by Factfinder.
 - (b) Objections to Findings.
 - (c) Review by the Board.
 - (d) Recommended Discipline.
 - (e) Quorum; Dissent; Dismissal.
- 12. Costs.
 - (a) Witness Fees.
 - (b) Transcript Cost.
 - (c) Other Costs.
- 13. Supreme Court Review.
 - (a) Filing and Service.
 - (b) Prompt Consideration.
 - (c) Briefs.
 - (d) Additional Findings and Filings; Supplemental Record.
 - (e) Delay for Further Proceedings.
 - (f) Decision.
 - (g) Consideration of Lawyer Discipline.
 - (h) Charge Against Supreme Court Justice.
 - (i) Petition for Rehearing.
- 14. Interim Suspension.
 - (a) Pending Criminal Prosecution.
 - (b) Pending Final Decision.
 - (c) Review of Permissive Suspension.
 - (d) Incompetency Suspension.
 - (e) Disability Suspension.
- 15. Special Provisions for Cases Involving Physical or Mental Disability.
 - (a) Procedure.
 - (b) Representation by Counsel.
 - (c) Medical Privilege.
- 16. Involuntary Retirement.
 - (a) Procedure.
 - (b) Effect of Involuntary Retirement.
- 17. Expungement.
 - (a) Dismissals.
 - (b) Case Files on Deceased Judges.
 - (c) Exceptions.

18. Amendment of Rules.

INDEX

TEXT OF RULES

Definitions:

"Complaint" is any communication, oral or written, made by judges, lawyers, court personnel or any member of the general public regarding the conduct of a judge.

"Evaluation" is a prompt and discreet inquiry by the executive secretary into the facts and circumstances of any complaint which alleges conduct listed in Rule 4(a).

"Investigation" is a full inquiry by the executive secretary, with the authorization of the board, into the facts and circumstances of any complaint which alleges conduct listed in Rule 4(a).

"Judge" is any judge, judicial officer, referee or other hearing officer employed in the judicial branch of the state of Minnesota, any judge of the Minnesota Tax Court or any judge of the Workers' Compensation Court of Appeals.

"Statement of Charges" is a complaint upon which the board has determined there is sufficient cause to proceed.

"Formal Complaint" is complaint upon which the board has determined to conduct a formal hearing.

(Amended effective January 1, 1996.)

RULE 1. ORGANIZATION OF BOARD

(a) **Appointment of Members.** The Board on Judicial Standards shall consist of one judge of Court of Appeals, three judges of district court, two lawyers who have practiced law in the state for at least ten years and four resident citizens of Minnesota who are not judges, retired judges or lawyers. The executive secretary, who shall be an attorney licensed to practice law in Minnesota, with a minimum of fifteen years' experience in the practice of law, including any service as a judge, shall be appointed by the board. All members shall be appointed by the governor with the advice and consent of the senate except that senate confirmation shall not be required for judicial members. Minnesota Statutes, section 490.15.

(b) Term of Office.

(1) The term of each member shall be four years.

(2) No member shall serve more than two full four-year terms or their equivalent, not to exceed eight years.

(c) Vacancy.

(1) A vacancy on the board shall be deemed to occur:

(i) When a member retires from the board; or

(ii) When a judge who is a member of the board ceases to hold the judicial office held at the time of selection; or

(iii) When a lawyer ceases to be in good standing to practice law in the courts of this state or is appointed or elected to a judicial office; or

(iv) When a lay member becomes a lawyer; or

(v) When a member is no longer a resident citizen.

(2) Vacancies shall be filled by selection of a successor in the same manner as required for the selection of the predecessor in office. A member selected to fill a vacancy shall hold office for the unexpired term of the predecessor. All vacancies on the board shall be filled within 90 days after the vacancy occurs.

(3) Members of the board may retire therefrom by submitting their resignation to the board, which shall certify the vacancy to the governor.

(d) Duties and Responsibilities of Executive Secretary. The executive secretary shall have duties and responsibilities prescribed by the board, including the authority to:

- (1) Receive complaints and allegations as to misconduct or disability;
- (2) Make preliminary evaluations;
- (3) Conduct investigations of complaints as directed by the board;
- (4) Recommend dispositions;
- (5) Maintain the board's records;
- (6) Maintain statistics concerning the operation of the board and make them available to the board and to the Supreme Court;
- (7) Prepare the board's budget for approval by the board and administer its funds;
- (8) Employ and supervise other members of the board's staff;
- (9) Prepare an annual report of the board's activities for presentation to the board, to the Supreme Court and to the public;
- (10) Employ, with the approval of the board, special counsel, private investigators or other experts as necessary to investigate and process matters before the board and before the Supreme Court. The use of the attorney general's staff prosecutors or law enforcement officers for this purpose shall not be allowed. The use of the director and staff of the Office of Lawyers Professional Responsibility for this purpose shall be allowed if the matter involves conduct of a judge, other than a Supreme Court Justice, that occurred prior to the judge assuming judicial office. Individuals employed or providing assistance under this section shall be deemed to be counsel to the Board on Judicial Standards for the purposes of these rules.

(e) Quorum and Chairperson.

(1) A quorum for the transaction of business by the board shall be six members of the board.

(2) The board shall elect from its members a chairperson and vice-chairperson, each of whom shall serve a term of two years. The vice-chairperson shall act as chairperson in the absence of the chairperson.

(f) Meetings of the Board. Meetings of the board shall be held at the call of the chairperson, the vice-chairperson, the executive secretary or the written request of three members of the board.

(g) Annual Report. At least once a year the board shall prepare a report summarizing its activities during the preceding year. One copy of this report shall be filed with the Supreme Court.

(h) Expenses of the Board and Staff.

(1) The expenses of the board shall be paid from appropriations of funds to the Board on Judicial Standards.

(2) Members of the board shall be compensated for their services as provided by law.

(3) In addition to the executive secretary, the board may appoint other employees to perform such duties as it shall direct, subject to the availability of funds under its budget.

(Amended effective January 1, 1996; amended effective March 30, 1999.)

Advisory Committee Comment - 1999 Amendment

Rule 1(d)(10) has been modified to allow the use of the director and staff of the Office of Lawyers Professional Responsibility to provide investigative and support services in situations involving conduct that occurred prior to a judge assuming judicial office. Related changes grant the Lawyers Professional Responsibility Board jurisdiction to consider whether such conduct warrants lawyer discipline. R.Bd.Jud.Std. 2; R.L.Prof.Resp. 6Z(a). It

is contemplated that complaints about the conduct of a judge occurring prior to the judge assuming judicial office will be investigated in the first instance by the Office of Lawyers Professional Responsibility [R.Bd.Jud.Std. 6Z(b); R.L.Prof.Resp. 6Z(b)(2)], and the results would be disclosed to the Board on Judicial Standards. R.Bd.Jud.Std. 5(a)(4); R.L.Prof. Resp. 20(a)(10). This allows for efficient and effective use of investigative resources by both disciplinary boards. Related changes also authorize the use of the hearing record, findings, and recommendations of the lawyer disciplinary process in the judicial disciplinary process. R.Bd.Jud.Std. 6Z(d); R.L.Prof.Resp. 6Z(b)(4).

Rule 1(d)(10) prohibits the use of the staff of the Office of Lawyers Professional Responsibility when the pre-bench conduct at issue involves a Supreme Court Justice because the office's director and staff are appointed and compensated by the Court. If such a case were to arise, it is contemplated that the Office of Lawyers Professional Responsibility would follow existing conflict procedures, which include assigning a former attorney or former board member to review and follow up on patently frivolous complaints and hiring outside counsel and investigators to handle other complaints. The prohibition against the use of office staff does not prohibit communication of confidential information between the two boards regarding matters involving the conduct of a justice occurring prior to assumption of judicial office.

Modifications to Rule 1(d)(10) also clarify that individuals employed or providing assistance to the executive secretary and the board are considered counsel to the board for purposes of these rules. This ensures, for example, that the immunity and privilege provisions under Rule 3 and the confidentiality and work product provisions under Rule 5 apply to these individuals when they are assisting the executive secretary and the board.

RULE 2. JURISDICTION AND POWERS OF BOARD

(a) Powers in General. The board shall have the power to receive complaints, investigate, conduct hearings, make certain summary dispositions, and make recommendations to the Supreme Court concerning:

- (1) Allegations of judicial misconduct;
- (2) Allegations of physical or mental disability of judges;
- (3) Matters of voluntary retirement for disability; and
- (4) Review of a judge's compliance with Minnesota Statutes, section 546.27.

(b) Jurisdiction Over Full-Time and Part-Time Judges. The board shall have jurisdiction over the conduct of all judges, including full-time judges, retired judges subject to assignment, and part-time judges such as conciliation court referees. This jurisdiction shall include conduct that occurred prior to a judge assuming judicial office. The board shall have exclusive jurisdiction in matters involving conduct occurring in a judicial capacity. The Lawyers Professional Responsibility Board shall have jurisdiction to consider whether discipline as a lawyer is warranted in matters involving conduct of any judge occurring prior to the assumption of judicial office and conduct of a part-time judge, such as a referee of conciliation court, not occurring in a judicial capacity.

(c) Jurisdiction Over Former Judge. The Lawyers Professional Responsibility Board shall have jurisdiction over a lawyer who is no longer a judge with reference to allegedly unethical conduct that occurred during or prior to the time when the lawyer held judicial office, provided such conduct has not been the subject of judicial disciplinary proceedings as to which a final determination has been made by the Supreme Court.

(d) Subpoena and Depositions.

(1) Depositions Limited. Depositions shall not be allowed, provided that, for good cause shown, a deposition may be taken of a witness living outside the state or physically unable to attend the hearing.

(2) Subpoenas for Investigation. During the evaluation and investigative stage of a proceeding, prior to a finding of sufficient cause to proceed pursuant to Rule 6(d), and subject to the limitations of Rule 2(d)(1):

(i) Upon resolution of the board, the executive secretary may make application for the issuance of a subpoena compelling any person, including a judge, to attend and give testimony, and to produce documents, books, accounts and other records. Such subpoena shall issue upon a showing that the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(ii) Failure or refusal of a judge who is the subject of information to cooperate or the intentional misrepresentation of a material fact by the judge shall constitute conduct prejudicial to the administration of justice and may be sufficient cause for the board to proceed under Rule 2(d)(3).

(3) **Subpoenas for Hearing.** At all other stages of the proceeding following a finding of sufficient cause to proceed pursuant to Rule 6(d), and subject to the limitations of Rule 2(d)(1), both the board and the judge being investigated shall be entitled to compel, by subpoena, attendance and testimony of witnesses, including the judge as a witness, and the inspection of documents, books, accounts and other records.

(4) **Issuing Subpoenas.** The District Court of Ramsey County shall issue subpoenas.

(5) **Motions.** Prior to the appointment of a factfinding panel pursuant to Rule 10(a), the District Court of Ramsey County shall have jurisdiction over motions arising from Rule 2(d) requests. Following the appointment of a factfinding panel, the presider of the factfinding panel before whom the matter is pending shall have jurisdiction over motions arising from Rule 2(d) requests and shall have all the powers of a district court judge. Any resulting decision or order of the presider of the factfinding panel or the District Court of Ramsey County may not be appealed before entry of the final order in the disciplinary proceeding. The judge shall be denominated by number or randomly selected initials in any District Court proceedings.

(e) **Impeachment.** Nothing in these rules shall affect the impeachment of judges under the Minnesota Constitution, Article 8.

(Amended effective January 1, 1996; amended effective March 30, 1999.)

Advisory Committee Comment - 1999 Amendment

Rule 2(a) has been amended to recognize that the board may make certain summary dispositions. These dispositions include proposed public reprimands under Rule 6(d)(1)(ii), which are subject to a judge's right to demand a formal hearing before the reprimand is made public, and nonpublic warnings, conditions, counseling, treatment, and assistance directed by the board under Rule 6(f).

Rule 2(b) has been modified to permit the Lawyers Professional Responsibility Board to also exercise jurisdiction to consider whether discipline as a lawyer is warranted in matters involving conduct of any judge occurring prior to the assumption of judicial office. As set forth in the definition section of these rules, the term "judge" includes any judge, judicial officer, referee, or other hearing officer employed in the judicial branch, and any judge of the Minnesota Tax Court or Worker's Compensation Court of Appeals. See Minnesota Statutes, sections 490.15-.18; 175A.01, subdivision 4; 271.01 (1998). The procedure to be followed in situations involving pre-bench conduct is set forth in Rule 6Z of these rules.

RULE 3. IMMUNITY; PRIVILEGE

Information submitted to the board or its staff and testimony given in the proceedings under these rules shall be absolutely privileged, and no civil action predicated thereon may be instituted against the complainant or witness, or their counsel. Members of the board, referees, board counsel and staff shall be absolutely immune from suit for all conduct in the course of their official duties.

(Amended effective January 1, 1996.)

RULE 4. GROUNDS FOR DISCIPLINE**(a) Grounds for Discipline Shall Include:**

(1) Conviction of a crime punishable as a felony under state or federal law or any crime involving moral turpitude;

(2) A persistent failure to perform judicial duties;

(3) Incompetence in the performance of judicial duties;

(4) Habitual intemperance;

(5) Conduct prejudicial to the administration of justice that brings the judicial office into disrepute, including, but not limited to, discrimination against or harassment of persons on the basis of race, color, creed, religion, national origin, sex, marital status, sexual preference, disability or age;

(6) Conduct that constitutes a violation of the Code of Judicial Conduct or Professional Responsibility.

(b) Disposition of Criminal Charges. A conviction, acquittal or other disposition of any criminal charge filed against a judge shall not preclude action by the board with respect to the conduct upon which the charge was based.

(c) Proceedings Not Substitute for Appeal. In the absence of fraud, corrupt motive or bad faith, the board shall not take action against a judge for making findings of fact, reaching a legal conclusion or applying the law as understood by the judge. Claims of error shall be left to the appellate process.

(Amended effective January 1, 1996.)

RULE 5. CONFIDENTIALITY

(a) Before Formal Complaint and Response. Except as otherwise provided in this rule, all proceedings shall be confidential until the Formal Complaint and response, if any, have been filed with the Supreme Court pursuant to Rule 8. The board shall establish procedures for enforcing the confidentiality provided by this rule.

(1) Upon determination that there is insufficient cause to proceed, the complainant, if any, shall be promptly notified and given a brief explanation of the board's action. The complainant shall also be promptly notified of any disposition pursuant to Rule 6(f).

(2) If at any time the board takes action as may be authorized pursuant to Rule 6(d)(1)(ii), such action shall be a matter of public record.

(3) Any action taken by the board pursuant to Rule 6(f) may be disclosed to the chief justice, chief judge and/or district administrator of the judicial district in which the judge sits. Such disclosure is at the discretion of the board and shall be for the purpose of monitoring future conduct of the judge and for assistance to the judge in modifying the judge's conduct. To the extent that any information is disclosed by the board pursuant to this provision, the chief justice, chief judge and/or district administrator shall maintain the confidentiality of the information in accordance with Rule 5.

(4) Information may be disclosed between the Board on Judicial Standards or executive secretary and the Lawyers Professional Responsibility Board or the director in furtherance of their duties to investigate and consider conduct that occurred prior to a judge assuming judicial office.

(b) After Formal Complaint and Response. Upon the filing of the Formal Complaint and written response, if any, with the Supreme Court, the files of the board, other than the Formal Complaint and the written response thereto, shall remain confidential unless and until any documents, statements, depositions or other evidence in the files of the board are introduced or used in a public hearing as provided in Rule 10.

(c) Work Product. The work product of the executive secretary and board counsel, and the records of the board's deliberations, shall not be disclosed.

(d) Public Statements by Board.

(1) In any case in which the subject matter becomes public through independent sources or through a waiver of confidentiality by the judge, the board may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the judge to a fair hearing without prejudgment and to state that the judge denies the allegations. The statement shall be first submitted to the judge involved for comments and criticisms prior to its release, but the board in its discretion may release the statement as originally prepared.

(2) If the inquiry was initiated as a result of notoriety or because of conduct that is a matter of public record, information concerning the lack of cause to proceed may be released by the board.

(3) The board may make such disclosures as it deems appropriate whenever the board has determined that there is a need to notify another person or agency in order to protect the public or the administration of justice.

(e) Disclosure for Judicial Selection, Appointment, Election or Assignment. When any state or federal agency seeks material in connection with the selection or appointment of judges or the assignment of a retired judge to judicial duties, the board may release information from its files only (1) if the judge in question agrees to such dissemination and (2) if the file reflects some action of the board pursuant to Rule 6(d), Rule 6(f) or Rule 7. If the board action was taken on or after January 1, 1996, such information may also be released if a judge is involved in a contested election, subject to the same restrictions.

(f) Waiver of Confidentiality. A respondent judge may waive confidentiality at any time during the proceedings.

(Amended effective January 1, 1996; amended effective March 30, 1999.)

Advisory Committee Comment - 1999 Amendment

Rule 5(a) has been modified by the addition of clause (4) to permit the exchange of information between the two disciplinary boards and their staff in situations involving conduct of a judge that occurred prior to the judge assuming judicial office. See also R.L.Prof.Resp. 20(a)(10). Both the Board on Judicial Standards and the Lawyers Professional Responsibility Board have jurisdiction in such cases. R.Bd.Jud.Std. 2(b); R.L.Prof.Resp. 6Z.

RULE 6. PROCEDURE PRIOR TO SUFFICIENT CAUSE DETERMINATION

(a) Initiation of Inquiry. An inquiry may be initiated as follows:

(1) An inquiry relating to conduct of a judge may be initiated upon a complaint.

(2) The board may on its own motion make an inquiry into the conduct or physical or mental condition of a judge.

(3) Upon request of the Chief Justice of the Supreme Court, the board shall make an inquiry into the conduct or physical or mental condition of a judge.

(b) Preliminary Evaluation. Upon receipt of a complaint as to conduct that might constitute grounds for discipline, the executive secretary shall conduct a prompt, discreet and confidential evaluation. The results of all evaluations shall be routinely submitted to the board.

(c) Investigation; Discretionary Notice.

(1) Upon review of the preliminary evaluation, or on its own motion, the board may, by resolution, authorize an investigation.

(2) Notice that an investigation has been authorized may be given to the judge whose conduct or physical or mental condition is being investigated.

(d) Sufficient Cause Determination.

(1) The board shall promptly consider the results of the investigation. If the board determines that there is sufficient cause to proceed, it shall either:

(i) comply with Rule 7, or where authorized under Rule 6Z(c), proceed directly to Rule 8; or

(ii) if the judge's conduct was unacceptable under one of the grounds for judicial discipline that does not merit formal proceedings or further discipline by the Supreme Court, issue a public reprimand. Prior to the issuance of a public reprimand pursuant to this Rule 6(d)(1)(ii), the judge shall be served with a copy of the proposed reprimand and a notice setting forth the time within which these rules require the judge to either submit comments and criticisms or to demand a formal hearing as provided in Rule 8. Within 20 days of service of the proposed reprimand, the board shall be served with either a written demand for a formal hearing as provided in Rule 8, or the written comments and criticisms of the judge regarding the proposed reprimand. If a timely demand for a formal hearing is made, the board shall comply with Rule 8. If no timely demand for a hearing is made, the board may consider the comments and criticisms, if any, but may in its discretion release the reprimand as originally prepared.

(2) A finding of sufficient cause shall require the concurrence of a majority of the full board.

(e) Insufficient Cause to Proceed.

(1) Upon determination that there is insufficient cause to proceed, the board shall promptly comply with Rule 5(a)(1). If informed of the proceeding, the judge shall also be promptly notified of its termination and the file shall be closed.

(2) A closed file may not be referred to by the board in subsequent proceedings unless the board has proceeded according to Rule 6(d) or (f) or Rule 7.

(f) Dispositions in Lieu of Further Proceedings. Even though the board does not find sufficient cause to proceed pursuant to Rule 7, it may make any of the following dispositions, unless the underlying conduct is part of a pattern involving the same or similar conduct:

(1) The board may warn the judge that the conduct may be cause for discipline.

(2) The board may impose reasonable conditions on a judge's conduct.

(3) The board may direct professional counseling, treatment or assistance for the judge.

(g) Objection to Dispositions. Any judge objecting to disposition of a complaint pursuant to Rule 6(f) may demand a full hearing before a factfinder as provided in Rule 8.

(h) Representation by Counsel. A judge may be represented by counsel, at the judge's expense, at any stage of the proceedings under these rules.

(Amended effective January 1, 1996; amended effective March 30, 1999.)

Advisory Committee Comment - 1999 Amendment

The change in Rule 6(d)(1)(i) recognizes that the Board on Judicial Standards may proceed directly to issuance of a formal complaint under Rule 8 when there has been a related public proceeding before the Lawyers Professional Responsibility Board involving conduct of a judge that occurred prior to the judge assuming judicial office. In these circumstances the procedure under Rule 7 may only serve to delay the disciplinary process.

Modifications to Rule 6(d)(1)(ii) allow the board to submit a proposed public reprimand to the judge for conduct that is unacceptable but not so serious as to warrant further discipline, e.g., a censure, by the Supreme Court. Disciplinary bodies in other jurisdictions have similar authority. See, e.g., Rule 6(g)(1), Rules of Procedure for the Arizona Commission on Judicial Conduct; Rules of the Georgia Judicial Qualifications Commission, Definition (c). The change is intended to provide the board with guidance

regarding when it is appropriate to proceed directly to a proposed reprimand (which is subject to a judge's right to demand a formal hearing before the reprimand is made public) in lieu of formal charges under Rules 7 and 8.

RULE 6Z. PROCEDURE FOR CONDUCT OCCURRING PRIOR TO ASSUMPTION OF JUDICIAL OFFICE

(a) Complaint; Notice. If either the executive secretary or the Office of Lawyers Professional Responsibility initiates an inquiry or investigation, or receives a complaint, concerning the conduct of a judge occurring prior to assumption of judicial office, it shall so notify the other. Notice is not required if all proceedings relating to the inquiry, investigation or complaint have been resolved before the judge assumes judicial office.

(b) Investigation. Complaints of a judge's unprofessional conduct occurring prior to the judge assuming judicial office shall be investigated by the Office of Lawyers Professional Responsibility and processed pursuant to the Rules on Lawyers Professional Responsibility. The Board on Judicial Standards may suspend a related inquiry pending the outcome of the investigation and/or proceedings.

(c) Authority of Board on Judicial Standards to Proceed Directly to Public Charges. If probable cause has been determined under Rule 9(j)(ii) of the Rules on Lawyers Professional Responsibility or proceedings before a referee or the Supreme Court have been commenced under those rules, the Board on Judicial Standards may, after finding sufficient cause under Rule 6 of the Rules of the Board on Judicial Standards, proceed directly to the issuance of a formal complaint under Rule 8 of those rules.

(d) Record of Lawyer Discipline Admissible in Judicial Disciplinary Proceeding. If there is a hearing under Rule 9 or Rule 14 of the Rules on Lawyers Professional Responsibility, the record of the hearing, including the transcript, and the findings and conclusions of the panel, referee, and/or the Court shall be admissible in any hearing convened pursuant to Rule 10 of the Rules of the Board on Judicial Standards. Counsel for the judge and the board may be permitted to introduce additional evidence, relevant to alleged violations of the Code of Judicial Conduct, at the hearing under Rule 10.

(Added effective March 30, 1999.)

Advisory Committee Comment - 1999 Amendment

Rule 6Z outlines the process for handling complaints concerning conduct by a judge before assuming judicial office. Related changes grant the Lawyers Professional Responsibility Board jurisdiction to consider whether such conduct warrants lawyer discipline, while the Board on Judicial Standards retains jurisdiction to consider whether the same conduct warrants judicial discipline. R.Bd.Jud.Std. 2; R.L.Prof.Resp. 6Z(a).

The provisions of Rule 6Z(a)-(d) are repeated in R.L.Prof.Resp. 6Z(b)(1)-(4). The committee felt that repetition of the significant procedural provisions was more convenient and appropriate than a cross-reference.

Rule 6Z(a) requires the staff of the Lawyers Professional Responsibility Board and the Judicial Standards Board to notify each other about complaints concerning conduct by a judge occurring before the judge assumed judicial office. Notice is not required if all proceedings relating to the inquiry, investigation or complaint have been resolved before the judge assumed judicial office.

Rule 6Z(a) neither increases nor decreases the authority of the executive secretary or Office of Lawyers Professional Responsibility to investigate or act on any matter. That authority is governed by other rules. Rule 6Z(a) merely establishes a mutual duty to provide notice about complaints or inquiries concerning conduct of a judge occurring before the judge assumed judicial office.

Although a fair number of complaints received by the executive secretary and the Office of Professional Responsibility are frivolous, there have been relatively few complaints

concerning conduct occurring prior to a judge assuming judicial office. Thus, the committee believes that this procedure will not result in a needless duplication of efforts.

Under Rule 6Z(b) it is contemplated that complaints about the conduct of a judge occurring prior to the judge assuming judicial office will be investigated in the first instance by the Office of Lawyers Professional Responsibility, and the results would be disclosed to the Board on Judicial Standards. R.Bd.Jud.Std. 5(a)(4); R.L.Prof.Resp. 20(a)(10). This allows for efficient and effective use of investigative resources by both disciplinary boards.

Rule 6Z(c) authorizes the Board on Judicial Standards to proceed directly to issuance of a formal complaint under Rule 8 when there has been a related public proceeding under the Rules on Lawyers Professional Responsibility involving conduct of a judge that occurred prior to the judge assuming judicial office. In these circumstances the procedure under Rule 7 may only serve to delay the disciplinary process.

Rule 6Z(c) does not prohibit the Board on Judicial Standards from proceeding to public disciplinary proceedings in cases in which only private discipline (e.g., an admonition) has been imposed under the Rules on Lawyers Professional Responsibility for conduct of a judge occurring prior to the judge assuming judicial office. In these cases, the Board on Judicial Standards would be required to follow Rule 7 (unless, of course, the matter is resolved earlier, for example, by dismissal or public reprimand).

Rule 6Z(d) authorizes the use of the hearing record and the findings and recommendations of the lawyer disciplinary process in the judicial disciplinary process. This is intended to streamline the judicial disciplinary hearing when there has already been a formal fact finding hearing in the lawyer disciplinary process, and permits the Supreme Court to rule on both disciplinary matters as quickly as possible.

Under Rule 6Z(d) it is contemplated that the hearing record and the findings and conclusions of the lawyer disciplinary process will be the first evidence introduced in the Rule 10 judicial disciplinary hearing. Counsel for the board and the judge may be permitted to introduce additional evidence relevant to alleged Code of Judicial Conduct violations at the hearing. Counsel must be aware that there may be situations in which the introduction of additional evidence will not be permitted. See, e.g., *In re Gillard*, 260 N.W.2d 562, 564 (Minn. 1977) (after review of hearing record and findings and conclusions from lawyer disciplinary process, Supreme Court ruled that findings would not be subject to collateral attack in the related judicial disciplinary proceeding and that additional evidence may be introduced only as a result of a stipulation or order of the fact finder); *In re Gillard*, 271 N.W.2d 785, 809 (Minn. 1978) (upholding removal and disbarment where Board on Judicial Standards as fact finder refused to consider additional testimony but allowed filing of deposition and exhibits and made alternative findings based on those filings). Although the rules do not expressly provide for a pre-hearing conference, it is contemplated that admissibility issues will be resolved by the presider of the fact finding panel sufficiently in advance of the hearing to allow the parties adequate time to prepare for the hearing.

RULE 7. PROCEDURE WHERE SUFFICIENT CAUSE FOUND

(a) Statement of Charges.

(1) If no reprimand is issued under Rule 6(d)(1)(ii) after a finding of sufficient cause to proceed, the executive secretary shall prepare a Statement of Charges against the judge setting forth the factual allegations and the time within which these rules require the judge to serve a written response. Where more than one act of misconduct is alleged, each shall be clearly set forth.

(2) The judge shall be served promptly with a copy of the Statement of Charges. Service shall be accomplished in accordance with the Rules of Civil Procedure.

(3) The judge shall serve a written response on the board within 20 days of service of the Statement of Charges. A personal appearance before the board shall be permitted in lieu of or in addition to a written response. In the event that the judge elects to appear personally, a verbatim record of the proceedings shall be made.

(b) **Termination after Response.** The board may terminate the proceeding and dismiss the Statement of Charges following the response by the judge, or at any time thereafter, and shall in that event comply with Rule 5(a)(1) and give notice to the judge that it has found insufficient cause to proceed.

(c) **Quorum.** If the board elects to proceed as authorized in Rule 8, such action must be by concurrence of a majority of the full board.

(Amended effective January 1, 1996; amended effective March 30, 1999.)

Advisory Committee Comments - 1999 Amendments

The cross reference to Rule 6(d)(1)(ii) recognizes that in certain situations the board may proceed directly to a proposed reprimand (which is subject to a judge's right to demand a formal hearing before the reprimand is made public) in lieu of formal charges under Rules 7 and 8.

RULE 8. FORMAL COMPLAINT AND NOTICE

(a) Formal Complaint.

(1) Promptly following the board's determination pursuant to Rule 7(c), or when required pursuant to Rule 6(d)(1)(ii) or Rule 16(a), the board shall issue a Formal Complaint setting forth the charges against the judge, the factual allegations and the time within which these rules require the judge to serve a written response. Where more than one act of misconduct is alleged, each shall be clearly set forth.

(2) The judge shall be served promptly with a copy of the Formal Complaint. Service shall be accomplished in accordance with the Rules of Civil Procedure.

(3) The judge shall serve a written response on the board within 20 days of service of the Formal Complaint. The executive secretary, upon receiving the written response of the judge, or if none has been received, within 25 days of service of the Formal Complaint, shall file the Formal Complaint and the written response, if any, with the Supreme Court.

(b) Notice of Hearing.

(1) Upon the filing of Formal Complaint and Response, if any, with the Supreme Court, the board shall schedule a public hearing. The date shall be selected to afford the judge ample time to prepare for the hearing, but shall not be later than 90 days after the filing of the Formal Complaint with the Supreme Court. The judge and all counsel shall be notified of the time and place of the hearing.

(2) In extraordinary circumstances, the board shall have the authority to extend the hearing date as it deems proper.

(Amended effective January 1, 1996.)

RULE 9. DISCOVERY

(a) **Witnesses; Depositions.** Within 20 days after the service of a response, or after the expiration of the time for service of a response, whichever occurs first, counsel for the board and the judge shall exchange the names and addresses of all persons known to have knowledge of the relevant facts. The presider of the factfinding panel shall set a date for the exchange of the names and addresses of all witnesses the parties intend to call at the hearing. Subpoenas and depositions shall be governed by Rule 2(d).

(b) **Other Evidence.** Counsel for the board and the judge shall exchange:

(1) non-privileged evidence relevant to the Formal Complaint, documents to be presented at the hearing, witness statements and summaries of interviews with witnesses who will be called at the hearing; and

(2) other material only upon good cause shown to the presider of the factfinding panel.

(c) **Exculpatory Evidence.** Counsel for the board shall provide the judge with exculpatory evidence relevant to the Formal Complaint.

(d) **Duty of Supplementation.** Both the board and the judge have a continuing duty to supplement information required to be exchanged under this rule.

(e) **Completion of Discovery.** All discovery must be completed within 60 days of the service of the response or the expiration of the time for service of the response, whichever occurs first.

(f) **Failure to Disclose.** The presider of the factfinding panel may preclude either party from calling a witness at the hearing if the party has not provided the opposing party with the witness' name and address, any statements taken from the witness or summaries of any interviews with the witness.

(g) **Resolution of Disputes.** Disputes concerning discovery shall be determined by the presider of the factfinding panel before whom the matter is pending. The decisions of the presider of the factfinding panel may not be appealed before entry of the final order in the disciplinary proceeding.

(h) **Civil Rules Not Applicable.** Proceedings under these rules are not subject to the Rules of Civil Procedure regarding discovery except Rules 26.03, 30.02-.07, 32.04-.05, and 37.04.

(Amended effective January 1, 1996.)

RULE 10. FORMAL HEARING

(a) **Factfinder.** The formal hearing shall be a public hearing conducted before a three-member panel, acting as a factfinder. Members of the factfinding panel shall be appointed by the Chief Justice of the Supreme Court within 10 days of the filing of the Formal Complaint with the Supreme Court. One member of the factfinding panel who is either a judge or a lawyer shall be designated as the presider by the Chief Justice of the Supreme Court. Whenever possible, two members of the factfinding panel shall be retired judges, in good standing, but in any event, shall be either judges or lawyers, and one member of the factfinding panel shall be a citizen who is not a judge, retired judge or lawyer.

(b) **Rules of Evidence and Due Process.** In the hearing, all testimony shall be under oath, the Rules of Evidence shall apply, and the judge shall be accorded due process of law.

(c) **Presentation: Burden of Proof; Cross-Examination; Recording.**

(1) An attorney or attorneys of the board's staff or special counsel retained for the purpose, shall present the matter to the factfinder.

(2) The board has the burden of proving by clear and convincing evidence the facts justifying action.

(3) The judge shall be permitted to adduce evidence and produce and cross-examine witnesses, subject to the Rules of Evidence.

(4) Every formal hearing conducted under these rules shall be recorded verbatim.

(d) **Amendments.** By leave of the presider of the factfinding panel for good cause shown or by consent of the judge, the Formal Complaint may be amended after commencement of the hearing if the judge and the judge's counsel are given adequate time to prepare a response.

(Amended effective January 1, 1996.)

RULE 11. PROCEDURE FOLLOWING FORMAL HEARING

(a) **Submission by Factfinder.** The factfinder shall submit its findings and recommendations, along with the record and transcript of testimony, to the board for review. The same materials shall also be provided to the judge under investigation.

(b) **Objections to Findings.** Counsel for the judge and board may submit written objections to the findings and recommendations.

(c) **Review by the Board.** The findings and recommendations and the hearing record shall be promptly reviewed by the board. The board may substitute its judgment for that of the factfinder.

(d) **Recommended Discipline.** Based on clear and convincing evidence in the hearing record, the board shall make a recommendation to the Supreme Court of any of the following sanctions:

- (1) Removal;
- (2) Retirement;
- (3) Imposing discipline as an attorney;
- (4) Imposing limitations or conditions on the performance of judicial duties;
- (5) Censure;
- (6) Imposing a civil penalty;
- (7) Suspension with or without pay; or
- (8) Any combination of the above sanctions.

(e) **Quorum; Dissent; Dismissal.**

(1) A recommendation for discipline shall be reported to the Supreme Court only if concurred in by a majority of the full board.

(2) If a majority of the full board fail to concur in a recommendation for discipline, the matter shall be dismissed.

(3) Any dissenting opinion shall be transmitted to the Supreme Court with the majority decision.

(Amended effective January 1, 1996; amended effective March 30, 1999.)

Advisory Committee Comment - 1999 Amendment

Rule 11(d)(5) has been modified by deleting reprimand from the list of sanctions that may be issued after a formal hearing. Under Rule 6(d)(1)(ii), a reprimand may be issued by the board without resort to formal proceedings in situations involving conduct that is unacceptable under one of the grounds for judicial discipline but not so serious as to warrant further discipline, such as a censure, by the Supreme Court.

RULE 12. COSTS

(a) **Witness Fees.**

(1) All witnesses shall receive fees and expenses to the same extent allowable in an ordinary civil action.

(2) Expenses of witnesses shall be borne by the party calling them, unless:

(i) Physical or mental disability of the judge is in issue, in which case the board shall reimburse the judge for the reasonable expenses of the witnesses whose testimony is related to the disability; or

(ii) The judge is exonerated of the charges, in which case the Supreme Court may determine that the imposition of costs and expert witness fees would work a financial hardship or injustice and shall then order that those fees be reimbursed.

(b) **Transcript Cost.** A transcript of all proceedings shall be provided to the judge without cost.

(c) **Other Costs.** All other costs of these proceedings shall be at public expense.

(Amended effective January 1, 1996.)

RULE 13. SUPREME COURT REVIEW

(a) **Filing and Service.** The board shall, at the time it files its record, findings and recommendations with the Supreme Court, serve copies upon the respondent judge. Proof of service shall also be filed with the Court.

(b) Prompt Consideration. Upon the filing of a recommendation for discipline or disability retirement, the Court shall promptly docket the matter for expedited consideration.

(c) Briefs. The board shall, and the judge may, file briefs with the Court in accordance with the requirements of Rule 128, Rules of Civil Appellate Procedure.

(d) Additional Findings and Filings; Supplemental Record.

(1) If the Court desires an expansion of the record or additional findings with respect either to the recommendation for discipline or to the sanction to be imposed, it shall remand the matter to the board with appropriate directions, retaining jurisdiction, and shall stay proceedings pending receipt of the board's filing of the additional record.

(2) The Court may order additional filings or oral argument as to specified issues or the entire matter.

(3) The Court without remand and prior to the imposition of discipline may accept or solicit supplementary filings with respect to medical or other information, provided that the parties have notice and an opportunity to be heard.

(e) Delay for Further Proceedings. The Court, on receipt of notice of an additional proceeding before the board involving the same judge, may stay proceedings pending the board's termination of this additional proceeding. In the event that additional recommendations for discipline of the judge are filed, the Court may impose a single sanction covering all recommendations.

(f) Decision. The Court shall review the record of the proceedings on the law and the facts and shall file a written opinion and judgment directing such disciplinary action as it finds just and proper, accepting, rejecting or modifying in whole or in part, the recommendation of the board.

(g) Consideration of Lawyer Discipline. When the Board on Judicial Standards recommends the removal of a judge, the Court shall promptly notify the judge and the Lawyers Professional Responsibility Board and give them an opportunity to be heard in the Court on the issue of lawyer discipline.

(h) Charge Against Supreme Court Justice. When any Formal Complaint has been filed against a member of the Supreme Court, the review under Rule 13 shall be heard and submitted to a panel consisting of the Chief Judge of the Court of Appeals or designee and six others chosen at random from among the judges of the Court of Appeals by the Chief Judge or designee.

(i) Petition for Rehearing. In its decision, the Court may direct that no petition for rehearing will be entertained, in which event its decision shall be final upon filing. If the Court does not so direct, the respondent may file a petition for rehearing in accordance with the requirements of Rule 140, Rules of Civil Appellate Procedure.

(Amended effective January 1, 1996.)

RULE 14. INTERIM SUSPENSION

(a) Pending Criminal Prosecution. The Supreme Court may, without the necessity of board action, suspend a judge with pay upon the filing of an indictment or complaint charging the judge with a crime punishable as a felony under state or federal law. The Supreme Court may suspend the pay of such judge upon a conviction of a crime punishable as a felony under state or federal law or any other crime involving moral turpitude. If the conviction is reversed, suspension terminates and the judge shall be paid the salary for the period of suspension.

(b) Pending Final Decision. Interim suspension, with pay, pending final decision as to ultimate discipline, may be ordered by the Supreme Court in any proceeding under these rules.

(c) Review of Permissive Suspension. Any judge suspended under section (b) of this rule shall be given a prompt hearing and determination by the Supreme Court upon application for review of the interim suspension order.

(d) **Incompetency Suspension.** Upon a determination by the board of a judge's incompetence, there shall be an immediate interim suspension, with pay, pending a final disposition by the Supreme Court.

(e) **Disability Suspension.** A judge who claims that a physical or mental disability prevents the judge from assisting in the preparation of a defense in a proceeding under these rules shall be placed on interim suspension, with pay. Once an interim suspension has been imposed, there shall be a determination pursuant to Rule 15 of whether in fact there is such a disability. If there is such a disability, the judge may be retired. If there is a finding of no disability, the disciplinary proceeding shall continue.

(Amended effective January 1, 1996.)

RULE 15. SPECIAL PROVISIONS FOR CASES INVOLVING PHYSICAL OR MENTAL DISABILITY

(a) **Procedure.** In carrying out its responsibilities regarding physical or mental disabilities, the board shall follow the same procedures that it employs with respect to discipline for misconduct.

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

(c) **Medical Privilege.**

(1) If the complaint involves the physical or mental condition of the judge, a denial of the alleged condition shall constitute a waiver of medical privilege, and the judge shall be required to produce the judge's medical records.

(2) If medical privilege is waived, the judge is deemed to have consented to a physical or mental examination by a qualified medical practitioner designated by the board. The report of the medical practitioner shall be furnished to the board and the judge.

(Amended effective January 1, 1996.)

RULE 16. INVOLUNTARY RETIREMENT

(a) **Procedure.** A judge who refuses to retire voluntarily may be involuntarily retired by the Supreme Court. If attempts to convince a judge to retire voluntarily fail, then the board shall proceed as provided in Rules 8, 9, 10 and 11. The Supreme Court shall then proceed as provided in Rule 13.

(b) **Effect of Involuntary Retirement.** A judge who is involuntarily retired shall be ineligible to perform judicial duties pending further order of the Supreme Court and may, upon order of the Supreme Court, be transferred to inactive status or indefinitely suspended from practicing law in the jurisdiction.

(Amended effective January 1, 1996.)

RULE 17. EXPUNGEMENT

The executive secretary shall expunge records as follows:

(a) **Dismissals.** All records or evidence of a complaint found without sufficient cause shall be destroyed three years after the complaint is received by the board or the board authorizes an investigation, whichever occurs first, except in the event of a new complaint involving the same judge within the three years which event shall renew the three year period.

(b) **Case Files on Deceased Judges.** All case files on deceased judges shall be destroyed.

(c) **Exceptions.** Upon application by the executive secretary to the chairperson for good cause shown and with notice and opportunity to be heard to the judge, records

which would otherwise be expunged under this rule may be retained for such additional time as the chairperson may deem appropriate.

(Added effective January 1, 1996.)

RULE 18. AMENDMENT OF RULES

As procedural and other experience may require or suggest, the board may petition the Supreme Court for further rules of implementation or for necessary amendments to these rules.

(Renumbered effective January 1, 1996.)

INDEX - JUDICIAL STANDARDS

ATTORNEYS

Representation
Judicial standards board, Rule 1

BURDEN OF PROOF

Formal hearings
Judicial standards board, Rule 10

COMPLAINTS

Amendment
After commencement of hearing
Judicial standards board hearings, Rule 10
Dismissed complaints
Expungement of record
Requirements, Rule 17
Proceeding directly to public charge
Grounds
Judicial standards board proceedings, Rule 6Z
Unprofessional conduct occurring prior to assumption of
judicial office
Notice requirements
Judicial standards board proceedings, Rule 6Z

COSTS AND DISBURSEMENTS (COURTS)

Judicial standards board
Public expense, Rule 12

COURT OF APPEALS JUDGES

Representation
Judicial standards board, Rule 1

CROSS-EXAMINATION

Formal hearings
Judicial standards board, Rule 10

DISCOVERY

Completion
Requirements, Rule 9
Disputes concerning
Resolution, requirements, Rule 9
Failure to disclose
Sanctions, Rule 9
Non-privileged evidence
Exchange, requirements, Rule 9
Rules of civil procedure
Inapplicable, Rule 9
Supplementation of information
Requirements, Rule 9
Witness lists
Exchange, requirements, Rule 9

DISMISSALS

Dismissed complaints
Expungement of record
Requirements, Rule 17

DISTRICT COURT JUDGES

Representation
Judicial standards board, Rule 1

EVIDENCE

Admissible evidence
Record of lawyer discipline, Rule 6Z
Presentation
Formal hearings
Judicial standards board, Rule 10

GOVERNOR

Appointments by
Judicial standards board
Members, Rule 1

JUDGES

Claims of error against
Proper forum, requirements, Rule 4
Criminal charges against
Disposition, effect, Rule 4
Discipline
Grounds
Generally, Rule 4

JUDGES (Cont'd)

Impeachment
Application of law, Rule 2
Representation
Judicial standards board, Rule 1
Respondent judges
Notice received
Insufficient cause to proceed, Rule 6
Medical reports, Rule 15
Notice of hearing, Rule 8
Objections by
Dispositions in lieu of further proceedings, Rule 6
Findings of factfinding panel, judicial standards board
hearings, Rule 11
Physical or mental disability
Judicial standards board proceedings, Rule 15
Medical privilege, waiver, Rule 15
Right to an attorney
Judicial standards board proceedings, Rule 6
Service of process by
Responses, formal complaints, Rule 8
Responses, statement of charges, Rule 7
Service of process on
Findings and recommendations, judicial standards
board, Rule 13
Formal complaints, Rule 8
Statement of charges, Rule 7
Suspension
Disability suspension, Rule 14
Incompetency suspension, Rule 14
Interim suspension, Rule 14
Retirement
Involuntary retirement
Effect, Rule 16
Procedure, Rule 16
Unprofessional conduct prior to assumption of judicial office
Complaints concerning
Judicial standards board, duties, Rule 6Z
Lawyers professional responsibility office, duties, Rule
6Z
Waivers
Confidentiality
Judicial standards board proceedings, Rule 5
Medical privilege, Rule 15

JUDICIAL STANDARDS BOARD

Authorizations by
Investigations, Rule 6
Chairperson
Election, Rule 1
Depositions
Taking, limitations, Rule 2
Determinations by
Insufficient cause to proceed
Procedure, generally, Rule 6
Sufficient cause to proceed
Majority concurrence, requirements, Rule 6
Procedure, generally, Rule 6, Rule 7
Statement of charges, duties, Rule 7
Disclosure
Information about judges
Restrictions, Rule 5
Dispositions
In lieu of further proceedings
Generally, Rule 6
Executive secretary
Duties, generally, Rule 1
Preliminary evaluations, duties, Rule 6
Statement of charges, duties, Rule 7
Subpoenas, duties, Rule 2
Work product
Disclosure, prohibited, Rule 5
Findings
Sufficient cause to proceed
Statement of charges, contents, requirements, Rule 7

JUDICIAL STANDARDS BOARD (Cont'd)**Hearings**

Amendment of complaint after commencement of hearing,
Rule 10

Due process

Requirements, Rule 10

Factfinding panel

Findings, Rule 11

Members, Rule 10

Presider, appointment, Rule 10

Formal hearings

Procedure following, Rule 11

Procedure, requirements, Rule 10

Recording

Requirements, Rule 10

Rules of evidence

Application of rules, Rule 10

Investigations by

Executive secretary, duties, Rule 1, Rule 6

Procedural requirements, generally, Rule 6

Unprofessional conduct of judge occurring prior to
assumption of judicial office

Investigation by Lawyers Professional Responsibility

Office, effect, Rule 6Z

Jurisdiction**Judges**

Former judges, Rule 2

Full-time judges, Rule 2

Part-time judges, Rule 2

Referees (court), Rule 2

Members

Appointment, Rule 1

Appointments by

Executive secretary, Rule 1

Immunity from lawsuits, Rule 3

Retirement, Rule 1

Term of office, Rule 1

Vacancy on board

Determination, Rule 1

Filling, procedure, Rule 1

Notice given

Insufficient cause to proceed, Rule 6

Investigations

Discretionary notice, Rule 6

Notice of hearing, Rule 8

Notice received

Medical reports, Rule 15

Opinions

Dissenting opinions

Requirements, Rule 11

Organization

Generally, Rule 1

Petitions by

Amendment of rules, Rule 18

Proceedings**Complaints**

Proceeding directly to public charge, grounds, Rule 6Z

Confidentiality

After formal complaint and response, Rule 5

Prior to formal complaint and response, Rule 5

Requirements, generally, Rule 5

Waivers, Rule 5

Discovery, see DISCOVERY

Evidence, see EVIDENCE

Hearings, see Hearings under this topic

Physical or mental disability of judge

Duties, Rule 15

Prior to sufficient cause determination

Initiation of inquiry, Rule 6

Procedural requirements, generally, Rule 6

Quorum, requirements

Disciplinary recommendations, Rule 11

Generally, Rule 1

Proceeding to hearing, sufficient cause, Rule 7

Termination

Following response to statement of charges, Rule 7

Recommendations by

Discipline, Rule 11

JUDICIAL STANDARDS BOARD (Cont'd)**Records**

Executive secretary, duties, Rule 1, Rule 17

Expungement

Case files on deceased judges, Rule 17

Dismissal of complaints, Rule 17

Exceptions, Rule 17

Reports given

Annual report, Rule 1

Review by

Findings and recommendations of factfinder, Rule 11

Rules governing

Amendment, Rule 18

Generally, Rule 1 to Rule 18

Service of process by

Findings and recommendations, Rule 13

Formal complaints

Requirements, Rule 8

Statement of charges

Requirements, Rule 7

Service of process on**Responses**

Formal complaints, Rule 8

Statement of charges, Rule 7

Statements by

Requirements, Rule 5

Subpoenas

Issuance, see SUBPOENAS

Vice-chairperson

Election, Rule 1

Work product

Disclosure, prohibited, Rule 5

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**Investigations by**

Unprofessional conduct of judge occurring prior to
assumption of judicial office

Effect, Rule 6Z

Generally, Rule 6Z

Notice received

Recommendation of removal, judicial standards board,
Rule 13

MOTIONS

After appointment of factfinding panel

Power to hear

Presider of factfinding panel, Rule 2

Prior to appointment of factfinding panel

Power to hear

Ramsey County District Court, Rule 2

PRIVILEGES AND IMMUNITIES**Judicial standards board**

Immunity from lawsuits, Rule 3

RAMSEY COUNTY DISTRICT COURT**Motions****Jurisdiction**

Prior to appointment of factfinding panel, Rule 2

Subpoenas

Issuance, duties, Rule 2

SENATE**Approvals by**

Judicial standards board members

Judicial members, exception, Rule 1

Requirements, generally, Rule 1

SERVICE OF PROCESS**Formal complaints**

Requirements, Rule 8

Statement of charges

Requirements, Rule 7

SUBPOENAS**Issuance**

Ramsey County District Court, duties, Rule 2

Subpoenas for hearing

Use by judge being investigated, Rule 2

Use by judicial standards board, Rule 2

Subpoenas for investigation

Executive secretary, duties, Rule 2

SUPREME COURT

Chief justice

Appointments by

Presider, factfinding panel, judicial standards board
hearings; Rule 10

Hearings

Findings and recommendations, judicial standards board

Prompt consideration, requirements, Rule 13

Stay pending board's termination of additional
proceeding involving same judge, Rule 13

Supplemental record, Rule 13

Judges

Formal complaints against

Procedure, Rule 13

Notice given

Recommendation of removal, judicial standards board,
Rule 13

Notice received

Majority decisions

Judicial standards board, Rule 11

Orders

Findings and recommendations, judicial standards board,
Rule 13

Suspension of respondent judge

Disability suspension, Rule 14

Incompetency suspension, Rule 14

Interim suspension, Rule 14

Amendment of rules governing judicial standards board,
Rule 18

SUPREME COURT (Cont'd)

Petitions to

Rehearing

Generally, Rule 13

Reports received

Annual report

Judicial standards board, Rule 1

Review by

Finding and recommendations

Judicial standards board, Rule 13

TRANSCRIPTS

Judicial standards board hearings

Provided to judge without cost, Rule 12

WAIVERS

Confidentiality

Judges

Judicial standards board proceedings, Rule 5

WITNESSES

Expenses, payment

Requirements, Rule 12

Fees

Requirements, Rule 12

Lists

Disclosure, requirements, Rule 9

Names and addresses

Failure to disclose

Sanctions, Rule 9

Grounds for Judicial Recall

TEXT OF RULE

GROUND FOR JUDICIAL RECALL

A judge may be subject to recall for serious malfeasance or nonfeasance during the term of office in the performance of the duties of the office or conviction during the term of office for a serious crime. No judge may be recalled for the discretionary performance of a lawful act or a prescribed duty.

(a) “Malfeasance” means the intentional commission of an unlawful or wrongful act by a judge in the performance of the judge’s duties that is substantially outside the scope of the authority of the judge and that substantially infringes on the rights of any person or entity.

(b) “Nonfeasance” means the intentional, repeated failure of a judge to perform specific acts that are required duties of the judge.

(c) “Serious crime” means a crime that is punished as a gross misdemeanor, as defined in Minnesota Statutes, section 609.02, and that involves assault, intentional injury or threat of injury to person or public safety, dishonesty, stalking, aggravated driving while intoxicated, coercion, obstruction of justice, or the sale or possession of controlled substances.

“Serious crime” also means a crime that is punished as a misdemeanor, as defined in section 609.02, and that involves assault, intentional injury or threat of injury to person or public safety, dishonesty, coercion, obstruction of justice, or the sale or possession of controlled substances.

(Added effective July 1, 1998.)