

New Rules Galore

For the most part, the various sets of rules that collectively may be thought of as “the ethics rules” change slowly. The major revision of a set of those rules, such as the multi-year process that culminated in October 2005 with changes to the Minnesota Rules of Professional Conduct (MRPC), is rare; more often one or two minor revisions occur, or such minor revisions are held until a sufficient number of changes are proposed to warrant drafting a petition to the supreme court.

Recently, the court promulgated a “flurry” of changes to the Rules on Lawyers Professional Responsibility (RLPR), the lawyer discipline system’s procedural rules, and to both the Code of Judicial Conduct and the procedural Rules of the Board on Judicial Standards. All of these changes are the end result of study committees appointed by the court, usually with the active involvement of the MSBA, to review those rules and make recommendations. In each case, the new rules will be effective on July 1, 2009.

RLPR Amendments

The rule amendments with the most direct impact on the lawyer discipline system are the changes to the RLPR. The Lawyers Board petitioned for several of the amendments which were adopted, while the MSBA and the Supreme Court Advisory Committee to Review the Lawyer Discipline System, which

submitted its report last year, recommended other changes.¹

The most dramatic of the revisions is to the probable cause hearing process (Rule 9, RLPR). Before the Director’s Office is permitted to file a petition in the supreme court seeking public discipline of an attorney, a Lawyers Board panel must make a finding of probable cause for

public discipline, unless the attorney stipulates to waive the necessity of such a hearing.² Panel hearings historically have been evidentiary hearings on the merits, with live testimony, affidavits and documents submitted. Often there has been little to distinguish the probable cause hearing from the subsequent public hearing before a referee appointed by the supreme court. Since a panel hearing to establish probable cause for discipline can instead require clear and convincing evidence to issue a private admonition, hearings occasionally are quite extensive. Minnesota is believed to be the only jurisdiction that conducts such hearings to establish probable cause for discipline.

The supreme court advisory committee recommended, and the court now has accepted, that the process be changed to have most probable cause determinations made without a live hearing, based upon written submissions. Probable cause hearings now will only be held at the discretion of the panel. Panels can still authorize an admonition, which can be appealed by the lawyer to a different panel for a hearing. Time limits also have been established for the submission of information.

Whether this change will prove to be as significant as it appears at first blush will depend largely upon the number of times that a panel opts to conduct a hearing after its preliminary review of the documentary record. This may hinge on whether they consider credibility issues to be critical to a determination; in my own experience, facts or issues can be determined without live testimony far more often than may be assumed. In any event, the advisory committee recommended change and the supreme court has ordered it, so it seems incumbent on all participants to make the new system work effectively.

The new RLPR also include notable changes to provisions concerning reinstatements and confidentiality. A lawyer seeking reinstatement from suspension or disbarment no longer need serve the petition on the MSBA President. For some time now, the reason for such a requirement was purely historical. The rules also require that a petitioner from disbarment take and pass the full bar examination before being reinstated; that requirement has been amended to

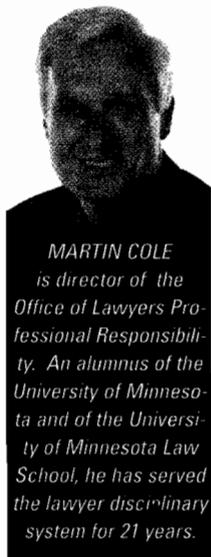
establish that the lawyer must pass the exam before filing a petition for reinstatement. This conserves resources by deferring the costs of an investigation and reinstatement hearing (and possible briefing and oral argument before the supreme court) until it’s established that the applicant can pass the bar exam.

Amendments to the rules regarding confidentiality now have added district ethics committee members to the list of individuals who are not subject to deposition or compelled testimony except upon a showing of extraordinary circumstances and compelling need. Also, a new section (Rule 20(f)) has been added stating that the files of the Director’s Office relating to advisory opinions, trust account overdraft notifications, and probations are confidential except in subsequent disciplinary proceedings or upon the consent of the lawyer who received the advisory opinion or overdraft notice, or who is the subject of probation. This amendment simply codifies what has long been the office’s position regarding these files.

At this time no changes have been made to the Minnesota Rules of Professional Conduct (MRPC), the substantive rules that are enforced through the RLPR. The ABA has adopted amendments to the Model Rules of Professional Conduct but Minnesota thus far has chosen not to adopt these proposals. Model Rule 1.10 (Imputation of Conflicts of Interest) was amended by the ABA to allow screening of lateral hires by law firms in almost all situations where the hiring firm is adverse to clients of the lateral hire or her former firm, without regard to the extent that individual participated in the prior representation of those clients.³ Model Rule 3.8 (Special Responsibilities of a Prosecutor) now contains a requirement that prosecutors who come to know of clear evidence that a convicted defendant was not in fact guilty shall take steps to remedy the conviction.⁴ These proposals may be revisited in Minnesota, but likely only if a significant number of other jurisdictions adopt the proposals.

Judicial Rules

The other area in which rules have been extensively amended is judicial conduct. The Code of Judicial Conduct was amended last December but the



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changes are not effective until July 1 of this year. Although there were some substantive changes, the most noticeable amendments involve reorganization and reordering of the canons. Particularly interesting is that the prohibitions on judicial candidates accepting endorsements and personally soliciting funds both remain part of the Code.

These sections are the subject of a constitutional challenge in federal court, presently on appeal to the 8th Circuit Court of Appeals.⁵

This spring the Minnesota Supreme Court completely overhauled the Rules of the Board on Judicial Standards (BJS), the counterpart to the RLPR in the lawyer discipline system. The guidelines for investigation and disposition of complaints against judges have been substantially amended, and now bear a stronger resemblance to the lawyer discipline procedures. One of the changes most sought by judges is the ability to challenge a private admonition without having to do so

publicly. In addition, the board no longer may substitute its own findings for those of a hearing panel. Also, a mechanism was added to expedite certain complaints against candidates during a judicial election. These recommendations also arose out of a supreme court review committee.

Wait and See

As indicated earlier, it is rare for so many sets of professional rules to be amended so extensively at the same time. Nevertheless, periodic review and revision of substantive and procedural rules is a necessary process to ensure fairness to all participants in the systems for discipline of lawyers and judges. Determining how well the latest round of amendments meet that standard likely will take a while, maybe even a few years, so it may be too early to judge them. Nevertheless, for those who are interested, copies of all of these new rules can be found on the web at www.mncourts.gov/lprb and www.bjs.state.mn. ▲

Notes

¹ See Cole, "Supreme Court Advisory Committee Report," *Bench & Bar of Minnesota* (July 2008).

http://www2.mnbar.org/benchandbar/2008/jul08/prof_response.htm

² In limited situations, the director may make a motion to the panel chair or board chair for probable cause. Criminal convictions or flagrant noncooperation (such as failing to attend the mandatory prehearing meeting) are examples of when such a motion is permitted. Rules 10(c) and (d), RLPR.

³ See Cole, "Law Firm Hiring and Screening," *Bench & Bar of Minnesota* (October 2008), http://www2.mnbar.org/benchandbar/2008/oct08/prof_response.html for a discussion of this issue after it previously had been rejected.

⁴ The full ABA Model Rule 3.8 sections read:

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

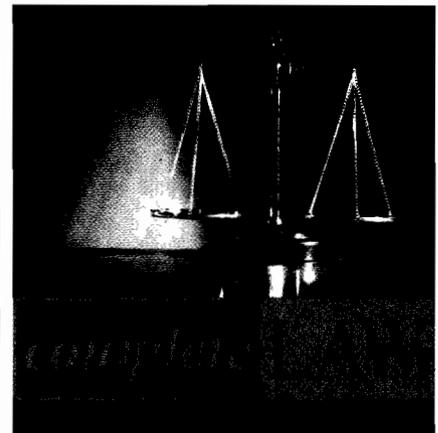
(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

⁵ *Wersal v. Sexton, et al.*, Civ. No. 08-CV-613 (D. Minn. 02/04/09). Judge Montgomery ruled that the challenged sections are not unconstitutional and granted summary judgment in favor of the Board on Judicial Standards and the Lawyers Professional Responsibility Board (whose members are the named defendants in their official capacity).



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