

FURTHER AMENDMENTS TO THE RULES

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Reprinted from *Bench & Bar of Minnesota* (July 1987)

Effective July 1, 1987, the Rules on Lawyers Professional Responsibility have been amended by order of the Minnesota Supreme Court. These amendments are not nearly as extensive as the 1986 amendments, which implemented certain recommendations of the Supreme Court Advisory Committee. The current amendments affect the procedural rules governing lawyer discipline investigations and proceedings. The amendments do not affect the substantive Rules of Professional Conduct, which establish the ethical standards governing the profession.

The current rules amendments were proposed by the Lawyers Professional Responsibility Board, principally to expedite proceedings in the most serious cases of alleged unprofessional conduct. There was no opposition to these proposals. The Court modified the proposals only slightly and added one change on its own motion.

The most significant changes in the rules may be summarized as follows:

1. Expanding the situations in which the preliminary panel hearing may be bypassed.
2. Protecting director's work product, particularly opinion work product, and board communications from unwarranted discovery efforts.
3. In extraordinary circumstances, allowing for a referee to perform a panel's function, or a panel to perform the referee's function.
4. Providing for temporary suspension of the lawyer's license upon a referee disbarment recommendation.
5. Miscellaneous changes.

Bypassing Panel Procedures.

A new rule 10(d) was adopted, providing:

(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.

Rule 10 previously allowed for dispensing with preliminary probable cause panel hearings upon agreement of the parties, certain admissions, or certain criminal convictions. Because a finding of probable cause to

believe public discipline is warranted was routine and virtually automatic in certain kinds of situations, Rule 10(d) was added so that the panel would not have to convene on such matters. Instead, a panel chair, on motion hearing, may approve the filing of a public petition in certain situations described in the rule. The rule change will correct problems such as panel members convening from different parts of the state for a hearing at which the attorney does not appear, and in circumstances where the attorney has not appeared for or cooperated in any preliminary investigation or proceeding. Nor will a panel have to convene for the preliminary hearing when an attorney has admittedly failed to file tax returns or admitted other serious misconduct.

Work Product and Discovery Protection.

In the last few years there have been several attempts to depose the director, staff members, or board members, and to obtain the director's work product. These efforts were the subject of extensive motion practice and were largely unsuccessful. Rule 20(a) has been amended to provide:

(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:

...

(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.

...

(7) 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.

The purpose of the rule is to protect unwarranted and burdensome discovery tactics in the discipline context.

New Referee and Panel Functions.

The preliminary probable cause panel hearing is held in front of volunteer board members. When a matter is unusually complex, it may be unfair to ask volunteers to review voluminous documents, hear numerous witnesses, and sit in hearings for several days. It may also be unfair to ask witnesses and litigants to go through both the panel hearing and (if there is a probable cause determination), go through a similar public hearing before a Supreme Court referee. To deal with such extraordinary situations, a new Rule 9(g) has been adopted, providing:

(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 reason, 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.

Only when the panel and board chair certify to the Court that the matter is not suitable for submission to a panel may the Court either appoint the referee in the panel's place, remand the matter to a panel, or direct the filing of a petition.

A somewhat similar rule (Rule 14(f)) has been adopted for cases with limited areas of dispute, allowing panels to substitute for referees as follows:

(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 that 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).

Referee Disbarment Recommendation and Semiautomatic Suspension.

It is not unusual for six months or more to elapse between the time a referee makes findings, conclusions, and a recommendation for discipline and the final decision by the Court. It seems fair to balance the interests of the public and the attorney, when the referee recommends disbarment, by providing that the attorney shall be temporarily suspended during the court's decision-making period unless an order is made to the contrary. The new Rule 16(e) provides:

(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.

Miscellaneous.

Panel hearing exhibits and panel affirmance of admonitions. Rule 9(f)(3) has been amended to require that each party provide copies of his or her own exhibits to the panel members. Rules 9(k) and (m) (formerly 9(j) and (l)), were amended to require that the director notify the respondent of appeal rights in an admonition appeal only when the panel has affirmed the admonition.

Additional charges. Rule 10(e) (formerly Rule 10(d)) was amended to require the director to present

additional charges to the board chair or vice chair where a petition under Rule 12 is pending before the Court, and the matter was not heard previously by a panel.

Subpoenas for referee hearings. On several occasions questions have arisen as to jurisdiction to issue subpoenas for witnesses and documents for proceedings before a referee pursuant to Rule 14. Rule 14 has been amended to add a subsection (c) which provides that the District Court of Ramsey County shall issue subpoenas, and the referee shall have jurisdiction to determine all motions arising from the issuance and enforcement of subpoenas.

Costs. Rule 24 has been amended to increase the amount of costs to the prevailing party from \$500 to \$750. This to ensure that a greater portion of the cost of the disciplinary system should be borne by those attorneys whose conduct requires public discipline. Rule 15 has been amended to permit the Court to order a respondent attorney to pay costs for asserting bad faith or vexatious claims in lawyer discipline proceedings.