LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING AGENDA

September 13, 2024 – 12:30pm (in person and via Zoom) –
Minnesota Judicial Center
Lunch provided for Board members 12:00pm

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1. Approval of minutes of May 17, 2024, meeting (attachment 1).

Personnel

2. Introduction of new liaison Justice Gordon Moore.

Committee Report

3. Rules committee report.

    a. ABA Opinion 511 on Listservs and ABA Model Rule 1.6 (attachments 2-4).

Discussion Items

4. Reminder of Board approved rule changes – petition anticipated Fall 2024 (attachment 5).

5. Public member consultation project – Antoinette Watkins.

Break – 10 Minutes

6. Updates on Board projects and participation:

    a. Working group between Lawyers Board, Minnesota District Judges Association, and Board of Judicial Standards considering rules regarding judicial elections.

i. Dan Cragg, Kevin Magnuson, Frank Leo.

b. Minnesota Supreme Court Advisory Committee on Rules of Lawyers Professional Responsibility (attachment 6).

c. Alternative Pathways to Admission Committee – Sharon Van Leer (attachment 7).

d. OLPR Seminar, September 27, 2024.
   i. Board Update presentation from Chair Ben Butler.

7. Director's report.

8. 2024 statistics – second quarter (attachment 8).

9. Open discussion.

10. Adjournment.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING

OPEN MEETING MINUTES
By Ava Shannon, Board Administrative Assistant

May 17, 2024 12:30 pm (In-person and via Zoom) – Minnesota Judicial Center

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Board member attendance:

- Landon Ascheman
- Ben Butler, Chair
- Katherine Brown Holmen
- Michael Friedman
- Tom Gorowsky
- Jordan Hart
- Tommy Krause
- Mark Lanterman
- Paul Lehman
- Kevin Magnuson
- Melissa Manderschied
- Jill Nitke Scott
- Kristi Paulson, Vice Chair
- Jill Prohofsky
- Matthew Ralston
- Sharon Van Leer
- Carol Washington
- Bruce Williams
- John Zwier

Other attendees:

- Minnesota Supreme Court liaison Justice Margaret Chutich
- Susan Humiston, Director of the Office of Lawyers Professional Responsibility
- Ava Shannon, Board Administrative Assistant
- Members of the OLPR staff
- Members of the public

Minutes:

1. Ben Butler moved to approve the minutes of the January 2024, meeting. Bruce Williams seconded. The motion passed unanimously.

2. Chair Butler introduced Justice Chutich as the Board's liaison Justice and thanked her for her service as she retires. Justice Gordon Moore will take over as the Board's liaison on July 1, 2024.

3. The board introduced new members including Tom Gorowski, Jill Nitke Scott, John Zwier and Board's new administrative assistant, Ava Shannon.

4. Amendments to the Rule 1.8 previously proposed were discussed. The matter had previously been remanded to the Rules Committee for reconsideration. The committee made amendments based on feedback at the previous Board meeting and proposed new language. A motion to adopt the recommendation was made by Matthew Ralston and seconded by Bruce Williams. Mr. Williams also asked if Jeanette Boerner, head of Hennepin Co. Adult Representation Services and former Board Chair, supported the proposed change. Mr. Ralston reported that Ms. Boerner supported the change. Landon J. Ascheman called for discussion on the language. Chairman Butler called for a vote, it was passed unanimously, as follows:

MN Rule of Professional Conduct 1.8 – Conflict of Interest: Current Clients: Specific Rules

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

* * *

(4) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention; and

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client.

1.8 Commentary

[11] Paragraph (e)(4) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(4) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(4) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(4) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(4), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(4) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

5. Presentation by Minnesota State Bar Association's Professional Regulation Committee on respondent participation in complainant appeals

    a. Ken Jorgenson spoke on the "unfairness optic" to be told that Respondents can't reply to complainant appeals or that they are not wanted to.
    b. Mr. Jorgenson opined that this was a "change" in process that was made without notice.
    c. Mr. Jorgenson spoke about legal-aid lawyer who was subject to multiple complaints and how he felt that an ability to respond to dismissals was unfair.
    d. Mr. Jorgenson opined that the previous process, under which respondents were essentially discouraged from participating but that some occasionally would do so, had worked. He thought it was imperfect but changing without notice is a bad optic as far as the PRC committed was concerned.

e. Chair Butler asked if a better solution to the fairness issue would for OLPR to seek a preliminary response from respondent before deciding whether to investigate rather than have respondents participate for the first time before the non-fact-finding Board member. Mr. Jorgenson thought this was a terrible idea and equated it to OLPR investigating every complaint.
f. Several members stated that they never or almost never had seen respondents participate in complainant appeals. Members expressed concern about respondents' participation being inconsistent with the Board member's inability to resolve factual disputes in a complainant appeal.
g. Magistrate Prohofsky asked if there was a next step. Chair Butler said he was not inclined to take further action but that members could contact him to return the matter to an agenda if desired.

6. Proposed Meeting dates for 2025
    a. All Fridays, no Holiday weekends
    b. September and December date was changed to the 12th of 2025.
        i. 9/12/25
        ii. 12/12/25
    c. Paul J. Lehman moved to approve. Seconded by John Zwier. Approved unanimously.

7. Rule 6Z
    a. Frank Leo was not in attendance; Kevin M. Magnuson took the lead in discussing the committees ongoing discussion into rule 6Z.

8. Susan Humiston took the floor for the Director's Report, she thanked Chris Wengronowitz for her 6 years of service as this is her last meeting before retirement. Ms. Humiston then introduced the Board to Sam Shanley, Chris Wengronowitz' replacement. Jennifer Novak and Alan Golfarb were both introduced as new attorneys working for the OLPR. Ms. Humiston spoke about issues with finding a legal secretary.

    a. Performance reviews were discussed, there is a meeting in June.
    b. The OLPR has exhausted its reserve, we have been in the red for years but now the reserve is out, about $750 short.
    c. Director Humiston reported we continue to address cases within 6 months but that complaints continue to be up.

9. Graphs – Report on resolutions of complainant appeals.

10. Discussion

a. Question posed by Michael Friedman about timeline on rule changes answered by Chair Butler regarding his hopes to have the petition filed by Fall 2024.
b. Logistics of ABA releasing a rule, how does that percolate among the states?
    i. Formal ABA opinion on listserv asked by Mellissa Manderschied and answered by Susan Humiston. Humiston stated that in her opinion the ABA opinion models the OLPR interpretation of the rule, therefore meaning nothing should changed.

11. Bruce Williams motioned to adjourned, seconded by John Zwier.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 511 **May 8, 2024**

Confidentiality Obligations of Lawyers Posting to Listservs

Rule 1.6 prohibits a lawyer from posting questions or comments relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's informed consent if the lawyer's contributions will not disclose, or be reasonably likely to lead to the disclosure of, information relating to a client representation.

Introduction

This opinion considers whether, to obtain assistance in a representation from other lawyers on a listserv discussion group, or post a comment, a lawyer is impliedly authorized to disclose information relating to the representation of a client or information that could lead to the discovery of such information.[1] Without the client's informed consent, Rule 1.6 forbids a lawyer from posting questions or comments relating to a representation—even in hypothetical or abstract form—if there is a reasonable likelihood that the lawyer's posts would allow a reader then or later to infer the identity of the lawyer's client or the particular situation involved, thereby disclosing information relating to the representation. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, if the lawyer's contributions do not disclose information relating to any client representation. The principles set forth in this opinion regarding lawyers' confidentiality obligations when they communicate on listservs apply equally when lawyers communicate about their law practices with individuals outside their law firms by other media and in other settings, including when lawyers discuss their work at in-person gatherings.[2]

Relevant Principles Regarding the Duty of Confidentiality

Subject to exceptions not applicable here,[3] ABA Model Rule of Professional Conduct 1.6(a) provides that: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023.
[2] *See* ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 480 (2018) for a discussion of other forms of lawyer public commentary including blogs, writings, and educational presentations.
[3] This opinion does not discuss the exceptions to the confidentiality obligation provided for in paragraph (b) because we cannot envision a recurring situation in which any of the exceptions are likely to authorize disclosures of information relating to a representation on a lawyer's listserv.

out the representation or the disclosure is permitted by paragraph (b)."[4] Comment 3 explains that Rule 1.6 protects "all information relating to the representation, whatever its source" and is not limited to communications protected by attorney-client privilege.[5] A lawyer may not reveal even publicly available information, such as transcripts of proceedings in which the lawyer represented a client. As noted in ABA Formal Opinion 04-433 (2004), "the protection afforded by Model Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer." Among the information that is generally considered to be information relating to the representation is the identity of a lawyer's clients.[6]

Because Rule 1.6 restricts communications that "could reasonably lead to the discovery of" information relating to the representation,[7] lawyers are generally restricted from disclosing such information even if the information is anonymized, hypothetical, or in abstracted form, if it is reasonably likely that someone learning the information might then or later ascertain the client's identity or the situation involved.[8] Comment 4 explains, that without client consent, Rule 1.6 prohibits:

> disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

The breadth of Rule 1.6 was emphasized in ABA Formal Opinion 496 (2021), which cautioned lawyers about responding to online criticism: Lawyers "who choose to respond online must not disclose information that relates to a client matter *or that could reasonably lead to the discovery of confidential information by another*." (Emphasis added).

Lawyers may disclose information relating to the representation with the client's informed consent. "Informed consent" is defined in Rule 1.0(e) to denote "the agreement by a person to a

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[4] Comment 2 to Model Rule 1.6(a) emphasizes that a "fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."

[5] The attorney-client privilege is an evidentiary rule applicable to judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence about a client. The duty of client-lawyer confidentiality is not limited to those circumstances, nor is it limited to matters communicated in confidence by the client. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [3].

[6] Comment 2 to Rule 7.2, for example, notes that in lawyer advertising, client consent is required before naming regularly represented clients. *See also* Wis. Formal Op. EF-17-02 (2017) (lawyer may not disclose current or former client's identity without informed consent; not relevant that representation is matter of public record or case is long closed); Ill. State Bar Ass'n Advisory Op. 12-03 (2012) (lawyer must obtain informed consent before disclosing client names to professional networking group); Ill. State Bar Ass'n Advisory Op. 12-15 (2012) (lawyer may take part in an online discussion group if no information relating to the representation is disclosed and there is no risk that the client could be identified); ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 133-134 (10th ed. 2023).

[7] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [4].

[8] *See, e.g.*, Colo. Bar Ass'n Formal Op. 138 (2019) ("Consultations using hypotheticals do not implicate [Rule] 1.6 provided that the hypotheticals do not create a 'reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.'").

proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Comments 6 and 7 to Rule 1.0 advise that the necessary communication will ordinarily require the lawyer to confer with the client and explain the advantages and disadvantages of the proposed course of conduct. And obtaining consent will usually require a client's affirmative response; a lawyer generally may not assume consent from a client's silence.[9]

Additionally, Rule 1.6(a) permits a lawyer to reveal information relating to the representation of a client if "the disclosure is impliedly authorized in order to carry out the representation."[10] Comment 5 to Rule 1.6 explains that "[l]awyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers." Conversely, lawyers are generally not authorized to disclose information relating to the representation to lawyers outside the firm, including lawyers from whom the engaged lawyers seeks assistance. Rather, as a general matter, lawyers must obtain the client's informed consent before engaging lawyers in the representation other than lawyers in their firm.[11]

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[9] Lawyers who anticipate using listservs for the benefit of the representation may seek to obtain the client's informed consent at the outset of the representation, such as by explaining the lawyer's intention and memorializing the client's advance consent in the lawyer's engagement agreement. Rule 1.0(e) provides that for a client's consent to be "informed," the lawyer must "communicate[] adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Therefore, the lawyer's initial explanation must be sufficiently detailed to inform the client of the material risks involved. It may not always be possible to provide sufficient detail until considering an actual post.

[10] Comment 5 to Rule 1.6 explains that a lawyer is impliedly authorized to make disclosures "when appropriate in carrying out the representation." In many situations, by authorizing the lawyer to carry out the representation, or to carry out some aspect of the representation, the client impliedly authorizes the lawyer to disclose information relating to the representation, to the extent helpful to the client, for the purpose of achieving the client's objectives. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.3, cmt. [5] ("In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation."). For example, when a client authorizes a lawyer to conduct settlement negotiations or transactional negotiations, the client impliedly authorizes the lawyer to disclose information relating to the representation insofar as the lawyer reasonably believes that doing so will advance the client's interests. What is impliedly authorized will depend "upon the particular circumstances of the representation." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at 135. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) (lawyer experiencing data breach may reveal information relating to representation to law enforcement if lawyer reasonably believes disclosure is impliedly authorized, will advance client's interests, and will not adversely affect client's material interests); N.C. Formal Op. 2015-5 (2015) ("[p]roviding a client's new appellate counsel with information about the client's case, and turning over the client's appellate file to the successor appellate counsel, is generally considered appropriate to protect the client's interests in the appellate representation" and impliedly authorized); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421 (2001) (lawyer hired by insurance company to defend insured normally has implied authorization to share with insurer information that will advance insured's interests); *see also* RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 61 (3d ed. 2001) (A lawyer is impliedly authorized to disclose information that "will advance the interests of the client in the representation."). In at least one situation, the Rules themselves impliedly authorize the disclosure, even without the client's implicit approval. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14, cmt. [8] ("When taking protective action" on behalf of a client with diminished capacity pursuant to MODEL RULES OF PROF'L CONDUCT R. 1.14(b), "the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.").

[11] Comment 6 to Rule 1.1 states that "[b]efore a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent…"

Seeking Advice or Assistance from a Listserv Discussion Group

ABA Formal Opinion 98-411 (1998) addressed whether a lawyer is impliedly authorized to disclose information relating to the representation to another lawyer, outside the inquiring lawyer's firm and without the client's informed consent, to obtain advice about a matter when the lawyer reasonably believes the disclosure will further the representation. The opinion contemplated that the lawyer seeking assistance would share information relating to the representation, in anonymized form, with an attorney known to the consulting lawyer. It further contemplated that the consulted attorney would both ensure there was no conflict of interest between the consulting lawyer's client and the consulted attorney's clients and would keep the information confidential even in the absence of an explicit confidentiality obligation. The opinion concluded that, in general, a lawyer is impliedly authorized to consult with an unaffiliated attorney in a direct lawyer-to-lawyer consultation and to reveal information relating to the representation without client consent to further the representation when such information is anonymized or presented as a hypothetical and the information is revealed under circumstances in which "the information will not be further disclosed or otherwise used against the consulting lawyer's client." The opinion explained, "Seeking advice from knowledgeable colleagues is an important, informal component of a lawyer's ongoing professional development. Testing ideas about complex or vexing cases can be beneficial to a lawyer's client." However, the opinion determined that the lawyer has implied authority to disclose only non-prejudicial information relating to the representation for this purpose and may not disclose privileged information.

In this opinion, the question presented is whether lawyers are impliedly authorized to reveal similar information relating to the representation of a client to a wider group of lawyers by posting an inquiry or comment on a listserv. They are not. Participation in most lawyer listserv discussion groups is significantly different from seeking out an individual lawyer or personally selected group of lawyers practicing in other firms for a consultation about a matter. Typical listserv discussion groups include participants whose identity and interests are unknown to lawyers posting to them and who therefore cannot be asked or expected to keep information relating to the representation in confidence. Indeed, a listserv post could potentially be viewed by lawyers representing another party in the same matter. Additionally, there is usually no way for the posting lawyer to ensure that the client's information will not be further disclosed by a listserv participant or otherwise used against the client. Because protections against wider dissemination are lacking, posting to a listserv creates greater risks than the lawyer-to-lawyer consultations envisioned by ABA Formal Ethics Opinion 98-411.

Without informed client consent, a lawyer participating in listserv groups should not disclose any information relating to the representation that may be reasonably connected to an identifiable client. Comment 4 to Rule 1.6 envisions the possibility of lawyers using hypotheticals to discuss client matters. However, a lawyer must have the client's informed consent to post a hypothetical to a listserv if, under the circumstances, the posted question could "reasonably lead to the discovery of" information relating to the representation because there is a "reasonable likelihood" that the reader will be able to ascertain the identity of the client or the situation involved. Although this opinion focuses on lawyers' efforts to obtain information from other lawyers for the benefit of a legal representation, the obligation to avoid disclosing information relating to a representation applies equally when lawyers post on listservs for other purposes, such

as to reply to requests for help, to develop their practices by networking, or simply to regale their professional colleagues with "war stories."[12]

Not all inquiries to a listserv designed to elicit information helpful to a representation will disclose information relating to the representation. In some situations, because of the nature of the lawyer's practice, the relevant client or the situation involved will never become known, and therefore the lawyer's anonymized inquiry cannot be identified with a specific client or matter. In other cases, the question may be so abstract and broadly applicable that it cannot be associated with a particular client even if others know the inquiring lawyer's clientele. In circumstances such as these, a lawyer may post general questions or hypotheticals because there is no reasonable possibility that any listserv member, or anyone else with whom the post may be shared, could identify the specific client or matter.[13]

Illustratively, the authors of Oregon Bar Opinion 2011-184 explained that "[c]onsultations that are general in nature and that do not involve disclosure of information relating to the representation of a specific client" do not require client consent under Rule 1.6. Careful lawyers will often be able to use listservs to ask fellow practitioners for cases and articles on topics, for forms and checklists, and for information on how various jurisdictions address a court-connected concern without enabling other lawyers to identify the lawyer's client or the situation involved. Posting this sort of inquiry on a listserv, to the extent possible without disclosing information relating to the representation, may have advantages over a lawyer-to-lawyer consultation precisely because it is broadly disseminated. Maryland State Bar Association Ethics Opinion 2015-03 described peer-to-peer lawyer listservs as a "powerful tool" providing "the opportunity for a

[12] Lawyers should keep in mind that the confidentiality obligation continues after the representation ends. *See* Rule 1.9(c)(2) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client."). This restriction on the disclosure of information relating to a former representation applies even if the information is generally known. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 479 (2017) (discussing the "generally known" exception to the use of confidential information adversely to a former client allowed under Rule 1.9(c)(1) and distinguishing it from the broader prohibition against disclosure of that information). Unlike the counterpart provision (Disciplinary Rule 4-101) of the earlier Code of Professional Responsibility, Rule 1.6 does not permit disclosure of non-privileged information relating to a representation or former representation if its disclosure would not embarrass or harm a client and the client has not specifically asked the lawyer not to disclose it. Consequently, lawyers may not tell "war stories" about a former representation without the former client's consent if the former client or situation can be identified. As we have noted in the past, the restriction imposed by Rule 1.6 may have First Amendment implications, but the constitutional right to freedom of speech has historically been interpreted consistently with lawyers' confidentiality obligations to clients. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018) (commenting on First Amendment considerations when lawyers act in representative capacities).

[13] For example, a general question requesting case law on whether a warrantless search of a garbage bin outside a residence violates the Fourth Amendment is less likely to allow a reader to infer the client's identity than a hypothetical revealing the precise facts of a specific search. But if there is a reasonable likelihood that readers can correctly infer the client's identity, then even the general question discloses information relating to the representation, requiring informed consent. For example, a reader could infer that a lawyer who posts a question to a listserv about the constitutionality of searches of garbage bins located outside of a residence is representing a client whose garbage bin was searched, evidence was found, the lawyer would like to move to suppress the evidence, and the lawyer is unsure of all the relevant case law. Regardless of whether the implicit disclosure of this "information relating the representation" is prejudicial to the client, Rule 1.6 provides that if the client's identity could be ascertained, it is the client's decision whether to disclose this sort of information broadly via a listserv to assist the lawyer in conducting useful legal research.

lawyer to test his or her understanding of legal principles and to clarify the best way to proceed in unique situations."

The more unusual the situation, however, the greater the risk that the client can be identified, and therefore the greater the care that must be taken to avoid inadvertently disclosing client information protected by Rule 1.6. Oregon Bar Opinion 2011-184 makes the point. Matters "[w]hen the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer's client even without the client being named," are among those in which "the lawyer must first obtain the client's informed consent for the disclosures."

Additionally, when lawyers represent only one client (as in the case of in-house counsel or government lawyers) or their client's identity can be readily inferred (as in the case of a litigator seeking assistance with a pending or contemplated action), "a description of specific facts or hypotheticals that are easily attributable to the client likely violates Rule 1.6 in most contexts."[14] Also, if a matter is receiving media coverage or the group of listserv participants is comprised of a small, closely connected legal community, the risk of a Rule 1.6 violation is likely to be too great to permit the lawyer to post a hypothetical relating to the matter without the informed consent of the client. For example, where the listserv participants are familiar with each other's practice because they practice in a limited geographic area or a specialized practice setting, posting a hypothetical based on information relating to the representation of the client will be more likely to lead to disclosure of the client's identity to some other participant on the listserv. The lawyer should err on the side of caution and avoid specific hypotheticals, refrain from posting, or obtain the client's informed consent if there is any reasonable concern.[15]

Finally, it bears emphasizing that lawyer listservs serve a useful function in educating lawyers without regard to any particular representation. Lawyers use listservs to update one another about newly published decisions and articles or to share recommendations for helpful contractors or fellow practitioners. Comment 8 to Rule 1.1 advises lawyers to "keep abreast of changes in the law and its practice," and lawyer listservs can help in doing so. These uses, unrelated to any particular representation, would not require a lawyer to secure the informed consent of a client. A lawyer must, however, remain aware of the possible risks to confidentiality involved in any posts to a listserv. Even a general question about the law, such as a request for cases on a specific topic, may in some circumstances permit other users to identify the client or the situation involved. Therefore, before any post, a lawyer must ensure that the lawyer's post will not jeopardize compliance with the lawyer's obligations under Rule 1.6.

[14] Md. State Bar Ass'n Ethics Comm. Op. 2015-3 (2015).

[15] When seeking a client's informed consent to post an inquiry on a listserv, the lawyer must ordinarily explain to the client the risk that the client's identity as well as relevant details about the matter may be disclosed to others who have no obligation to hold the information in confidence and who may represent other persons with adverse interests. This may also include a discussion of risks that the information may be widely disseminated, such as through social media. A lawyer should also be mindful of any possible risks to the attorney-client privilege if the posting references otherwise privileged communications with the client. Whether informed consent requires further disclosures will depend on specific facts.

Conclusion

Rule 1.6 prohibits a lawyer from posting comments or questions relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's posts will disclose information relating to the representation that would allow a reader then or later to recognize or infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's consent if the lawyer's contributions will not disclose information relating to a client representation.

Rule 1.6: Confidentiality of Information

Share:

Client-Lawyer Relationship

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the

client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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Rule 1.6 Confidentiality of Information

(a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.

(b) A lawyer may reveal information relating to the representation of a client if:

(1) the client gives informed consent;

(2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;

(3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation;

(4) the lawyer reasonably believes the disclosure is necessary to prevent the commission of a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services or to prevent the commission of a crime;

(5) the lawyer reasonably believes the disclosure is necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

(6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm;

(7) the lawyer reasonably believes the disclosure is necessary to secure legal advice about the lawyer's compliance with these rules;

(8) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

(9) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order;

(10) the lawyer reasonably believes the disclosure is 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; or

(11) the lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(Amended effective January 1, 1990; amended April 14, 1992, effective June 1, 1992; amended effective October 1, 2005; amended effective April 1, 2015.)

Comment

[1] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law; the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(6) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably

certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(7) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[8] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(8) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[9] A lawyer entitled to a fee is permitted by paragraph (b)(8) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[10] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this rule and requires disclosure, paragraph (b)(9) permits the lawyer to make such disclosures as are necessary to comply with the law.

[11] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(9) permits the lawyer to comply with the court's order.

Detection of Conflicts of Interest

[12] Paragraph (b)(11) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a

lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [2]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of a divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[13] Any information disclosed pursuant to paragraph (b)(11) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(11) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(11). Paragraph (b)(11) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(11). In exercising the discretion converted by this rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b)does not violate this rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this rule. See Rule 3.3(c).

Withdrawal

[16] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or

disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Acting Competently to Preserve Confidentiality

[17] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[18] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[19] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Lawyers Professional Responsibility Board proposed rule amendments 2024

Rule 1.8 – Conflict of Interest: Current Clients: Specific Rules

(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.

(4) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention; and

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client.

1.8 Commentary

[11] Paragraph (e)(4) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(4) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.
[12] The paragraph (e)(4) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(4) prohibits the lawyer from (i) promising, assuring or implying the availability

of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; or (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(4), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(4) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

Rule 3.8 – Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that a prosecutor is required to disclose under applicable law and procedural rules which, a prosecutor knows or reasonably should know, 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.

Rule 3.8(g)
When a prosecutor knows of new, credible, and material evidence creating a reasonable belief 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 current jurisdiction,

i. promptly disclose that evidence to the defense unless the court authorizes delay, and
ii. make reasonable efforts to cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.

Rule 3.8(h)
When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's current jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

STATE OF MINNESOTA
IN THE SUPREME COURT

ADM10-8042
ADM10-8043

REPORT AND PROPOSED AMENDMENTS TO THE MINNESOTA RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON THE RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

June 28, 2024

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Ann Bildtsen
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I. SUMMARY

In 2022, the Supreme Court asked the Standing Committee on Professional Regulation of the American Bar Association (the ABA), which evaluates states' lawyer discipline systems, to review and evaluate Minnesota's lawyer discipline system and provide recommendations. The ABA provided its report and recommendations to the court in September 2022. Following a public comment period and hearing, the court filed an order on August 23, 2023, that adopted some of the ABA's recommendations and rejected others.[1] In adopting some of the recommendations, the court recognized that its decisions required amendments to the Rules on Lawyers Professional Responsibility (RLPR). *Order Regarding the Rep. & Recommendations of the Am. Bar Ass'n Standing Comm. On Pro. Regul. on the Minn. Law. Discipline Sys.*, Nos. ADM10-8042, 10-8043, at 1–2 (Minn. filed Aug. 23, 2023) (Aug. 2023 Order). Thus, the Supreme Court referred its decisions on the adopted recommendations to an advisory committee, *id*. at 3–4, and in a separate order, appointed the Advisory Committee. *In re Appointments to the Advisory Comm. On the Rules on Law. Pro. Resp.*, No. ADM10-8043 (Oct. 9, 2023).[2]

The Committee held its first meeting on October 16, 2023, and met at least monthly thereafter. At its first meeting, the Committee reviewed the tasks before it, distinguishing between the issues the court referred to it for review and recommendations and those for which no committee decision was needed. Exh. A, Oct. 16, 2023 Comm. Mtg. Agenda (Committee WorkTable); *see* Exh. C. The Committee embraced the principles that support Minnesota's lawyer discipline system and the goals that guided the court's decisions on the ABA's recommendations, approaching proposed amendments and changes with an eye on transparency, timeliness balanced with fairness, and maintaining public confidence while ensuring public protection. *See* Rule 2, RLPR (stating that "[i]t is of primary importance to the public and to the members of the Bar" for alleged misconduct to "be promptly investigated and disposed of with fairness and justice"); Aug. 2023 Order at 1 (noting that Minnesota's lawyer discipline system "has operated for over 50 years

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[1] The remaining recommendations were referred to the State Court Administrator, the Director of the Office of Lawyers Professional Responsibility ("the Office"), or the Lawyers Professional Responsibility Board ("the Board").

[2] The court also referred the petition filed by the Board, on February 17, 2023, to the Committee for consideration and recommendations (the "Board 2023 Pet'n."). *Order Appointing Advisory Comm on the Rules on Law. Pro. Resp.*, No. 10-8043, at 2–3 (Minn. filed Aug. 23, 2023).

with a commitment to fairness and transparency"). The Committee also considered proposed amendments with an eye on streamlining procedures, increasing efficiency, and enhancing clarity and guidance, particularly for lawyers who are self-represented before the Office, a Board Panel, or the court. *See* Aug. 2023 Order at 8–9 (noting that deadlines in the rules, among other ABA recommendations, "can lead to efficiency gains"); *id*. at 15-16 (setting out the objectives for Rule 9, including a streamlined process); *id*. at 17–18 (noting that additional details in Rule 18 on the standards and materials required for reinstatement will provide guidance).

At its first meeting, the Committee discussed the three major topics that would likely require substantial deliberations and debate: (1) developing a definition for reasonable cause and revising the procedures for determinations authorized by Rule 9, Aug. 2023 Order at 12–15; Rule 9, RLPR; (2) clarifying the requirements, including the materials needed, for reinstatement and adopting a 6-month standard for reinstatement by affidavit, Aug. 23 Order at 16–21; Rule 18, RLPR; and (3) developing the rules, format, and structure for a diversion program, Aug. 23 Order at 27–28. Given the significance of these issues, the Committee agreed to discuss each topic at every meeting. The Committee also established two subcommittees, one to work on proposed amendments to Rule 9 for cause determinations and admonition appeals, and one to develop a proposed rule for a diversion program. These subcommittees met at least monthly, developed proposed amendments, and presented recommendations and proposals at committee meetings for discussion and input.

Amendments to other rules, i.e., Rules 4–5, 8, 14, 19, were considered at each meeting, preliminarily approved, and reviewed again as amendments were approved that might impact those earlier, preliminarily approved amendments. With this approach, the Committee ensured that each amendment was raised, reviewed, debated, and then at a later meeting, reviewed again and approved. This approach also allowed the Committee to consider amendments within the overall structure of the Rules, the responsibilities of the Office, and the objectives of Minnesota's lawyer discipline system.[3]

[3] The court recognized that "housekeeping amendments" might be needed "for efficiency and clarity," but did not invite "a wholesale revision of the rules." *Order Appointing Advisory Comm. on the Rules on Law. Pro. Resp.*, No. 10-8043, at 2 (Minn. filed Aug. 23, 2023). The Committee recommends some amendments that fall into this category, which are set out in section III(8) of the report.

In February 2023, the Board filed a petition with the court, seeking various amendments to the rules. As directed by the court, the Committee also addressed these requested amendments. Some of the Board's proposed amendments overlapped with the Committee's consideration of the court's charge to the Committee in its August 2023 order, e.g., the proposed amendments to Rules 4 and 5, RLPR (the size of the Executive Committee). Other proposed amendments in the Board's petition sought changes in existing practices. Below, the Committee has identified its final recommendation on each of the Board's proposed amendments.

Outside of the regularly scheduled meetings, the Committee and the subcommittees conducted research, reviewed controlling Minnesota law, sought input from other resources, researched other states' rules, and developed and circulated drafts of proposed language for various rules. The Committee looked to guidance from other states (Colorado, California, Massachusetts, and Arizona) as it outlined the structure of a diversion program, developed the requirements for reinstatement, and drafted a definition of "reasonable cause." Committee members also worked in small groups to develop discrete proposals or present background information to the Committee, i.e., on the reinstatement process, outlining a reinstatement questionnaire, developing recommendations to update the language and procedures for disability status, and developing a range of deadlines for the Director's investigation. *E.g.*, Exh. A, Nov. 20, 2023 Mtg. Agenda (presentation by S. Humiston, E. Cooperstein); Exh. B, Minutes for Comm. Mtg. on Jan. 20, 2024 (presentation by W. Pentelovitch, P. Vang); Exh. A, March 25, 2024 Mtg. Agenda (proposed amendments to Rule 8(a), presented by B. Butler, E. Cooperstein); Exh. B, Minutes for Comm. Mtg. on April 15, 2024 (A. Hall presentation).

In April 2024, the Committee invited public input and comments regarding Minnesota's lawyer discipline system and the Committee's work. A public notice was posted on the Judicial Branch website, with an email alert sent to customers who receive public notifications. Exh. E. Committee members forwarded the public notice link to additional professional organizations, including the Minnesota State Bar Association and affinity bar associations; health advocacy groups including the National Alliance on Mental Illness, Lawyers Concerned for Lawyers, the

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On occasion, the Committee discussed other changes that might be made in the rules, to improve efficiency or increase transparency, but ultimately concluded that these changes are best considered by a future advisory committee. These items are found in the Committee WorkTable, attached as Exhibit C.

Health Professional Services Programs; and to volunteers in Minnesota's discipline system, including members of the Board and the chairs and vice-chairs of District Ethics Committees. Public comments were submitted over the next 6 weeks via an electronic form that allowed submitters to respond to several open-ended points and provide general feedback. Exh. F, Input Form. Members of the public could also request to speak directly to the Committee, at a meeting held on May 6, 2024.

Over 30 comments were received in this process; 4 people asked to speak to the Committee at the May 6 meeting, though only 1 person appeared before the Committee and presented remarks. A summary of the public comments is provided in Exhibit G.[4]

As a final step, the Committee undertook a holistic review of the rules, considering how its proposed amendments might impact other rules. Exh. A, June 17, 2024 Comm. Mtg. Agenda. A limited number of additional amendments are recommended as a result of this review.

II. OVERVIEW

Given the significance of the three major issues—Rule 9 proceedings, reinstatement, and diversion—the recommendations below begin with these issues. Recommendations and proposed amendments for individual rules apart from these issues then follow. Note that the amendments proposed by the Board in its February 2023 petition are identified and addressed within each individual rule.

Throughout its deliberations, the Committee considered the impact of its recommended amendments on current procedures, policies, and practices. Although there are different challenges with implementing different rules, the Committee ultimately concluded that most of the recommended amendments could be made effective immediately on adoption. The Committee has provided its reasoning for each proposed effective date, including to which matters or cases the amended rule should be applied. For ease of reference, a table showing the proposed effective dates, by rule, is included at the end of the report.

[4] Several commenters submitted materials along with their comments. These materials are not included with the exhibits to the report but are available on request.

The exhibits to this report, which include the Committee's agendas, meeting minutes, and a summary of proposed amendments, among other items, are attached as A-H.[5] An index to the exhibits is provided at the end of this report.

The proposed amendments are presented in traditional legislative format, with recommended amendments **underscored** to indicate new language, and deletions ~~**struck through**~~ to indicate eliminated language. On occasion, the Committee found that the substantial revisions to some rules, Rules 9 and 18, in particular, made it easier to include a clean version of the rule to grasp the overall structure of the new rule (as proposed). The clean (no redlining) versions of these rules are found immediately after the redlined version of the rule.

Respectfully Submitted,

ADVISORY COMMITTEE ON THE RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

[5] The materials for each of the Committee's meetings are lengthy and thus are not included with this report. Additional items can be provided upon request.

III. PROPOSED AMENDMENTS TO THE RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY AND ADVISORY COMMITTEE COMMENTARY

1. Rule 1 should be amended to adopt definitions used in Rule 9 proceedings and Rule 9 should be amended to streamline the procedures for Panel proceedings.

Introduction.

Rule 9, RLPR, codifies procedures when a panel of the Board is asked to make a disposition of a matter that comes before it, specifically, to consider the Director's request for a determination that cause exists to pursue public discipline or to hear a lawyer's appeal from the Director's issuance of an admonition. Rule 9(a), RLPR (discussing the procedures for "Charges"); Rule 9(j)(2), RLPR (discussing the panel's disposition of a lawyer's appeal of an admonition). As the ABA and the court noted, the procedures in this rule are "elaborate," which favors some streamlining. Aug. 2023 Order at 13, 15. The court also adopted the ABA's recommendation to define the cause standard, with the court deciding to use reasonable cause, rather than probable cause. *Id*. at 12–13.

The subcommittee on cause proceedings, chaired by Ann Bildtsen,[6] began its work with research on the cause definitions used in Minnesota criminal and civil proceedings, and in other states' lawyer discipline proceedings. The subcommittee found that "probable cause" and "reasonable cause" are used synonymously in Minnesota law, *see Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 406 (Minn. 1998); Minn. Stat. §245C.02, subds. 15–15a (2022) ("reasonable cause" definitions). This research confirmed that reasonable cause or probable cause generally represents more than a "mere" or "bare" suspicion, but less than a preponderance of the evidence. *State v. Harris*, 589 N.W.2d 782, 791 (Minn. 1999); *Wall*, 584 N.W.2d at 406. From this work, the subcommittee developed a definition of reasonable cause that it presented to the Committee, Exh. B, Jan. 22, 2024 Comm. Mtg. Minutes; refined the definition based on the Committee's input; then presented the final recommended definition to the

[6] Committee members Susan Humiston, Ryan McCarthy, William Pentelovitch, and Panhia Vang served on this subcommittee (Rita Coyle DeMeules as staff attorney).

Committee, as a proposed amendment to Rule 1, RLPR. Exh. B, June 17, 2024 Comm. Mtg. Minutes.[7]

The subcommittee then tackled the court's direction to "streamline the cause proceedings" in part by "limiting the adversarial nature of the submissions and presentations to the panel." Aug. 2023 Order at 15. Recognizing that the proceedings authorized by Rule 9 have two distinct substantive goals—determining whether cause exists to proceed with public discipline charges and determining the outcome of an appeal from the Director's issuance of an admonition—the subcommittee began by separating these two strands of the rule.[8] Next, the subcommittee identified the specific steps needed for a specific procedure, i.e., the notice to the lawyer or the Board panel, the submissions a panel may need for a cause proceeding, as opposed to an admonition appeal. From there, the subcommittee developed language to establish the relevant parameters, i.e., the nature of submissions, timing requirements, and panel dispositions.[9] Finally, the subcommittee re-ordered the paragraphs of the rule to address specific events first, i.e., paragraph (a) addresses cause proceedings, while paragraph (c) captures admonition appeals. The generally applicable steps for panel and Supreme Court proceedings are found in the remaining paragraphs of the rule.

As the court noted, "discovery tools" may not "need to be part of Rule 9," because the Director's file is available to the lawyer at this point. Aug. 2023 Order at 14, n.9 (quoting Rule 20(a)(4), RLPR, which allows the Director's nonprivileged materials to be produced upon request). Thus, as shown below, only limited discovery options are provided, and then only for an

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[7] Other provisions of the Rules on Lawyers Professional Responsibility use "probable cause," *see* Rule 6Z(b)(3), RLPR; Rule 20(a)(2), (c), RLPR, and the Committee recommends amendments to these rules to change those references, *see infra* at 75–76. Thus, the logical location for a definition of "reasonable cause" is Rule 1, RLPR.

[8] Rule 9 also has a procedure for revoking conditional admission, *see* Rule 8(d)(4)(iv), RLPR, which remains largely intact in the proposed revisions to Rule 9, *see infra* at 15 (Rule 9(b), RLPR, as amended).

[9] For clarity, guidance, and to codify existing practice, the Committee also recommends an amendment to the definition of "notify," *see* Rule 1(8), RLPR, to authorize the use of email when sending materials to the lawyer or the lawyer's counsel. Though this recommended amendment arose when considering the procedures in Rule 9, if adopted the amended definition will apply in other contexts, *e.g.*, Rule 8(d)(1)–(2), RLPR; Rule 12(d), RLPR.

admonition appeal. In addition, although "a decision on the merits of the misconduct allegation is not before the Board panel" during a cause proceeding, Aug. 2023 Order at 13, the parties are allowed to submit memoranda, affidavits, and other documents. The Panel is presumed, however, to make its decision based on those submissions and without oral argument. In other words, as recommended here, Rule 9(a) does not explicitly provide for discovery in the cause proceeding and allows for a hearing only if exceptional circumstances exist.

The Committee considered the amendments to Rule 9 at its March, April, and May meetings. After discussion in these meetings and further revisions in the subcommittee, the final version of Rule 9 was reviewed and voted on at the meeting held on June 17, 2024.

Specific Recommendations.

RULE 1. DEFINITIONS

As used in these Rules:

* * *

(3) "Count" means an alleged course of unprofessional conduct, designated as such in the Director's Charges of Unprofessional Conduct, and alleged to have violated one or more rules of professional conduct.

(43) "Executive Committee" means the committee appointed by the Chair under Rule 4(d).

(54) "Director" means the Director of the Office of Lawyers Professional Responsibility.

(65) "District Bar Association" includes the Range Bar Association.

(76) "District Chair" means the Chair of a District Bar Association's Ethics Committee.

(87) "District Committee" means a District Bar Association's Ethics Committee.

(98) "Notify" means to give ~~personal~~ notice a) ~~or to mail~~ by U.S. Mail or email to the person at the person's last known street address or email address; b) by U.S. Mail or email to the person ~~or the~~ at the street address or email address maintained in ~~on~~ this Court's attorney registration records; or c)~~, or~~ by U.S. Mail or email to the person's attorney if the person is represented by counsel.

(109) "Panel" means a panel of the Board as further described in Rule 4(e).

(11) "Panel Chair" means the chair of a Panel assigned to a matter.

(12) "Reasonable Cause" means facts sufficient to allow a person of ordinary care and prudence to believe, or entertain a strong impression, that the alleged misconduct occurred.

RULE 9. PANEL PROCEEDINGS[10]

(a) **~~Charges~~Public Discipline**. If a ~~the~~ matter is ~~to be~~ submitted to a Panel under Rule 8(d)(4)(i) or (iii) of these rules, it ~~the matter~~ shall proceed as follows:

(1) The Director shall prepare ~~c~~Charges of ~~u~~Unprofessional ~~c~~Conduct, request a Panel assignment from the Board Chair~~assign them to a Panel by rotation~~, and notify the lawyer of the Charges~~, the name, address, and telephone number of the Panel Chair and Vice Chair,~~ and ~~the provisions of~~ this Rule. Within 14 days after being ~~the lawyer is~~ notified of the Charges, the lawyer shall submit ~~an answer to the Charges~~ to the Panel ~~Chair~~ and the Director an Answer that admits, denies, or otherwise responds to each allegation in the Charges~~and may submit a request that the Panel conduct a hearing~~. Within 10 ~~ten~~ days after the lawyer submits an A~~a~~nswer, the Director and the lawyer may submit to the Panel and the opposing party memoranda with affidavits or ~~and~~ other documents that~~in~~ support or refute the Director's ~~of their positions~~ allegations. Submissions shall be made pursuant to the Director's instructions.

(2) Within 40 days after the lawyer is notified of the Charges, t~~T~~he Panel shall determine if reasonable cause as defined in Rule 1(12) exists based on the Charges, Answer, and other documents submitted. Absent exceptional circumstances, the Panel shall make its determination without oral argument or an evidentiary hearing. A request for an evidentiary hearing or oral argument must be made in the Answer and include evidence or information supporting the assertion of exceptional circumstances. If the Panel grants a request for oral argument or an evidentiary hearing under this paragraph, the Panel shall issue an order setting the date of the argument or hearing and the procedures governing the proceeding. ~~shall make a determination in accordance with paragraph (j) within 40 days after the lawyer is notified of the Charges based on the documents submitted by the Director and the lawyer, except in its discretion, the Panel may hear oral argument or conduct a hearing. If the Panel orders a hearing, the matter shall proceed in accordance with subdivisions (b) through (i). If the Panel does not order a hearing, subdivisions (b) through (i) do not apply.~~

(3) The Panel shall issue a written decision setting forth a reasonable cause determination or no reasonable cause determination as to each count in the Charges. A determination of reasonable cause or no reasonable cause is not a decision on the merits. The Panel shall instruct the Director to file in this Court a petition for disciplinary action for each count on which it finds reasonable cause. ~~The Panel Chair may extend the time periods provided in this subdivision for good cause.~~

(4) If the Panel finds clear and convincing evidence that misconduct occurred, but that it is isolated and non-serious, the Panel shall state the facts and conclusions constituting unprofessional conduct and issue an admonition. If the Panel finds reasonable cause on any count in the Charges, it shall not issue an admonition as to any other count in the Charges.

(b) **Revocation of Conditional Admission.** If the Director determines under Rule 8(d)(4)(iv) of these rules that a matter will be submitted to a Panel, the matter will proceed as set forth in subdivision (a)(1)-(3) of this rule, except if the Panel finds reasonable cause, the Panel shall instruct the Director to file a Petition for Revocation of Conditional Admission. ~~**Setting Pre-Hearing Meeting**. If the Panel orders a hearing, the Director shall notify the lawyer of:~~

[10] A clean version of Rule 9, as amended, can be found at page 15 of this report.

~~(1) The time and place of the pre-hearing meeting; and~~

~~(2) 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.~~

~~**(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 prehearing 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 proceedings.~~

~~**(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; and~~

~~(2) Each party shall mark and provide the other party with a copy of each affidavit or other exhibit to be introduced at the Panel hearing. The genuineness of each exhibit is admitted unless objection is served within ten days after the pre-hearing meeting. If a party objects, the Panel may award expenses of proof as permitted by the Rules of 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.~~

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

~~(1) The time and place of the hearing;~~

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

~~(3) The lawyer's obligation to appear at the time set unless the hearing is rescheduled by agreement of the parties or by order of the Panel 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.~~

(c) Admonition Appeal. When the Director issues an admonition under Rule 8(d)(2) of these rules, and the lawyer makes a demand under Rule 8(d)(2)(iii), the matter shall proceed as follows:

(1) The Director shall prepare Charges of Unprofessional Conduct, request a Panel assignment from the Board Chair, and notify the lawyer of the Charges and this Rule. Within 14 days after being notified of the Charges, the lawyer shall submit to the Panel and the Director an

Answer that admits, denies, or otherwise responds to each allegation in the Charges, and explains the reasons the admonition is unwarranted.

(2) Within 14 days after the lawyer's Answer is submitted, the parties must confer to identify mutually agreeable dates, which are not later than 120 days after the lawyer's Answer is submitted, when the parties, their counsel, and any witnesses authorized under subdivision (c)(4) of this Rule will be available for a hearing before the Panel, and when the parties will exchange exhibits and make written submissions to the Panel. The written submission must be made at least 10 days before the hearing. At the same conference, the parties must confer regarding the need for and proposed use of any discovery. The Director shall then promptly notify the Panel Chair of the mutually agreeable hearing dates, the schedule for the exchange of exhibits and written submissions, and any discovery agreements. Once the Panel has selected a hearing date, the Panel Chair shall issue a Scheduling Order reflecting the date exhibits will be exchanged and written submissions are due, the hearing date, and any discovery agreements.

(3) If the parties cannot agree on a matter concerning discovery, they shall submit their disagreement in writing to the Panel Chair, who will resolve the matter without oral argument. Absent exceptional circumstances, no interrogatories, requests for admissions, or expert depositions will be allowed. Except as modified herein, the Minnesota Rules of Civil Procedure applicable to discovery shall govern, except that the time for answers or objections is 10 days and the Panel Chair or Panel Vice-Chair shall rule upon any objections or requests for extensions of time. The District Court of Ramsey County shall have jurisdiction to issue subpoenas for depositions and testimony at Panel hearings, and to rule on motions arising from depositions. The lawyer shall be denominated by randomly selected initials in any District Court proceedings.

(4) The Panel shall receive evidence only in the form of affidavits, depositions or other documents except for live testimony by: (a) the lawyer; (b) a complainant or client of the lawyer if different; and (c) a witness whose testimony the Panel Chair or Vice-Chair has authorized for good cause.

If live testimony is authorized, it shall be subject to cross-examination and the Minnesota Rules of Evidence. A party may compel attendance of a witness or production of documentary or tangible evidence as provided in the Minnesota Rules of Civil Procedure. 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 randomly selected initials in any District Court proceedings.

(5) The Panel shall affirm the admonition if there is clear and convincing evidence of unprofessional conduct that is isolated and non-serious, or reverse the admonition if clear and convincing evidence is lacking. If there is reasonable cause to believe that public discipline is warranted, the Panel shall instruct the Director to file a petition for disciplinary action in this Court.

(d) Extensions. The Panel Chair may extend the time periods provided in this Rule for good cause.

(eg) Referee Appointment~~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, due to~~because of~~ exceptional complexity or other reasons, the Court may appoint a referee with directions to conduct the proceedings authorized by this Rule ~~a probable cause hearing~~ acting as a Panel would under this Rule. ~~, or~~ T~~t~~he Court may also 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 reasonable ~~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 proceeding~~hearing~~, the referee's determination from that proceeding ~~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 proceedings.~~

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

~~(1) The Chair shall explain the purpose of the hearing, which is:~~

~~(i) to determine whether there is probable cause to believe that public discipline is warranted, and the Panel will terminate the hearing on any charge whenever it is satisfied that there is or is not such probable cause;~~

~~(ii) if an admonition has been issued under Rule 8(d)(2) or 8(e), 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; or~~

~~(iii) to determine whether there is probable cause to believe that a conditional admission agreement has been violated, thereby warranting revocation of the conditional admission to practice law, and that the Panel will terminate the hearing whenever it is satisfied there is or is not such probable cause.~~

~~(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**. The Panel shall make one of the following determinations:~~

~~(1) In the case of charges of unprofessional conduct, the Panel shall:~~

~~(i) determine that there is not probable cause to believe that public discipline is warranted, or that there is not probable cause to believe that revocation of a conditional admission is warranted;~~

~~(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;~~

~~(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. If the Panel issues an admonition based on the parties' submissions without a hearing, the lawyer shall have the right to a hearing de novo before a different Panel. If the Panel issues an admonition following a hearing, the lawyer shall have the right to appeal in accordance with Rule 9(m); or~~

~~(iv) if it finds probable cause to revoke a conditional admission agreement, instruct the Director to file in this Court a petition for revocation of conditional admission.~~

~~(2) If the Panel held a hearing on a lawyer's appeal of an admonition that was issued under Rule 8(d)(2), or issued by another panel without a hearing, 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.~~

(fk) Notice of Disposition~~Notification~~. The Director shall notify the lawyer, the complainant, if any, and the District Ethics Committee, if any, ~~that has the complaint,~~ of the Panel's disposition under this Rule. ~~The~~ A notice ~~notification~~ to the complainant shall inform the complainant of the right to petition for review under subdivision (g~~l~~) of this Rule. 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 (h~~m~~) of this Rule.

(gl) Complainant's Petition for Review. If not satisfied with the Panel's disposition, the complainant may within ~~14~~ 30 days after the date of the Director's notice under subdivision (f) of this Rule file with the Clerk of the Appellate Courts a petition for review. The complainant shall, prior to or at the time of filing, serve a copy of the petition for review upon the lawyer ~~respondent~~ and the Director and ~~shall~~ file an affidavit of service with the Clerk of the Appellate Courts. The respondent shall be denominated by ~~number or~~ randomly selected initials in the proceeding, which shall be captioned "In re Panel Proceeding Number []" and reference the Director's file number for the matter. This Court will grant 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 a petition for revocation of conditional admission, or take any other action as the interest of justice may require.

(hm) Lawyer's ~~Respondent's~~ Appeal to Supreme Court. The lawyer may appeal a Panel's affirmance of the Director's admonition or an admonition issued by a Panel by filing a notice of appeal, with proof of service, with the Clerk of the Appellate Courts and serving a copy on the Director within 30 days after the date of the Director's notice under subdivision (f) of this Rule~~being notified of the Panel's action~~. The lawyer ~~respondent~~ shall be denominated by ~~number or~~ randomly selected initials in the proceeding, which shall be captioned "In re Panel Proceeding Number []" and reference the Director's file number for the matter. The Director shall notify the complainant, if any, of the lawyer's ~~respondent's~~ appeal. This Court may review the matter on the existing record or order such further proceedings as it deems appropriate. Upon conclusion of such proceedings, ~~the~~ this Court may either affirm the decision or make such other disposition as it deems appropriate.

(in) Manner of Recording. When a hearing is held under this Rule, an official court record by ~~The Director shall arrange for~~ a court reporter shall be made ~~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.~~

2024 Advisory Committee Comment

The amendments adopted on [date] require a Panel acting under subdivision (a) of this rule to make a cause determination based on "reasonable cause", which is now defined in Rule 1(12), RLPR. Previously, Rule 9 used "probable cause" as the standard for the panel's determination, and "probable cause" was undefined in the rules. The two standards have been interpreted similarly, with reasonable cause used more often in the civil context. *See Wall v. Fairview Hosp. & Healthcare. Servs.*, 584 N.W.2d 395, 406 (Minn. 1998) (noting in the context of a civil action under the Vulnerable Adults Act that "reasonable cause" means "probable cause" in a criminal case, and the terms have been used synonymously); *State v. Childs,* 269 N.W.2d 25, 27 (Minn. 1978) ("Reasonable cause is, of course, synonymous with probable cause."); *In re Schultz*, 375 N.W.2d 509, 513 (Minn. Ct. App. 1985) (applying a probable cause standard in a dental discipline matter).

[*Rule 9, clean version, with recommended amendments adopted*]

RULE 9. PANEL PROCEEDINGS

(a) Public Discipline. If a matter is submitted to a Panel under Rule 8(d)(4)(i) or (iii) of these rules, it shall proceed as follows:

(1) The Director shall prepare Charges of Unprofessional Conduct, request a Panel assignment from the Board Chair, and notify the lawyer of the Charges and this Rule. Within 14 days after being notified of the Charges, the lawyer shall submit to the Panel and the Director an Answer that admits, denies, or otherwise responds to each allegation in the Charges. Within 10 days after the lawyer submits an Answer, the Director and the lawyer may submit to the Panel and the opposing party memoranda with affidavits or other documents that support or refute the Director's allegations. Submissions shall be made pursuant to the Director's instructions.

(2) Within 40 days after the lawyer is notified of the Charges, the Panel shall determine if reasonable cause as defined in Rule 1(12) exists based on the Charges, Answer, and other documents submitted. Absent exceptional circumstances, the Panel shall make its determination without oral argument or an evidentiary hearing. A request for an evidentiary hearing or oral argument must be made in the Answer and include evidence or information supporting the assertion of exceptional circumstances. If the Panel grants a request for oral argument or an evidentiary hearing, the Panel shall issue an order setting forth the date of the argument or hearing and the procedures governing the proceeding.

(3) The Panel shall issue a written decision setting forth a reasonable cause determination or no reasonable cause determination as to each count in the Charges. A determination of reasonable cause or no reasonable cause is not a decision on the merits. The Panel shall instruct the Director to file in this Court a petition for disciplinary action for each count on which it finds reasonable cause.

(4) If the Panel finds clear and convincing evidence that misconduct occurred, but that it is isolated and non-serious, the Panel shall state the facts and conclusions constituting unprofessional conduct and issue an admonition. If the Panel finds reasonable cause on any count in the Charges, it shall not issue an admonition as to any other count in the Charges.

(b) Revocation of Conditional Admission. If the Director determines under Rule 8(d)(4)(iv) of these rules that a matter will be submitted to a Panel, the matter will proceed as set forth in subdivision (a)(1)-(3) of this Rule, except if the Panel finds reasonable cause, the Panel shall instruct the Director to file a petition for revocation of conditional admission.

(c) Admonition Appeal. When the Director issues an admonition under Rule 8(d)(2) of these rules, and the lawyer makes a demand under Rule 8(d)(2)(iii), the matter shall proceed as follows:

(1) The Director shall prepare Charges of Unprofessional Conduct, request a Panel assignment from the Board Chair, and notify the lawyer of the Charges and this Rule. Within 14 days after being notified of the Charges, the lawyer shall submit to the Panel and the Director an Answer that admits, denies, or otherwise responds to each allegation in the Charges, and explains the reasons the admonition is unwarranted.

(2) Within 14 days after the lawyer's Answer is submitted, the parties must confer to identify mutually agreeable dates, which are not later than 120 days after the lawyer's Answer is submitted, when the parties, their counsel, and any witnesses authorized under subdivision (c)(4)

of this Rule will be available for a hearing before the Panel, and when the parties will exchange exhibits and make written submissions to the Panel. The written submission must be made at least 10 days before the hearing. At the same conference, the parties must confer regarding the need for and proposed use of any discovery. The Director shall then promptly notify the Panel Chair of the mutually agreeable hearing dates, the schedule for the exchange of exhibits and written submissions, and any discovery agreements. Once the Panel has selected a hearing date, the Panel Chair shall issue a Scheduling Order reflecting the date exhibits will be exchanged and written submissions are due, the hearing date, and any discovery agreements.

(3) If the parties cannot agree on a matter concerning discovery, they shall submit their disagreement in writing to the Panel Chair, who will resolve the matter without oral argument. Absent exceptional circumstances, no interrogatories, requests for admissions, or expert depositions will be allowed. Except as modified herein, the Minnesota Rules of Civil Procedure applicable to discovery shall govern, except that the time for answers or objections is 10 days and the Panel Chair or Panel Vice-Chair shall rule upon any objections or requests for extensions of time. The District Court of Ramsey County shall have jurisdiction to issue subpoenas for depositions and testimony at Panel hearings and to rule on motions arising from depositions. The lawyer shall be denominated by randomly selected initials in any District Court proceedings.

(4) The Panel shall receive evidence only in the form of affidavits, depositions or other documents except for live testimony by: (a) the lawyer; (b) a complainant or client of the lawyer if different; and (c) a witness whose testimony the Panel Chair or Vice-Chair has authorized for good cause.

If live testimony is authorized, it shall be subject to cross-examination and the Minnesota Rules of Evidence. A party may compel attendance of a witness or production of documentary or tangible evidence as provided in the Minnesota Rules of Civil Procedure. 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 randomly selected initials in any District Court proceedings.

(5) The Panel shall affirm the admonition if there is clear and convincing evidence of unprofessional conduct that is isolated and non-serious, or reverse the admonition if clear and convincing evidence is lacking. If there is reasonable cause to believe that public discipline is warranted, the Panel shall instruct the Director to file a petition for disciplinary action in this Court.

(d) Extensions. The Panel Chair may extend the time periods provided in this Rule for good cause.

(e) Referee Appointment. 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 due to exceptional complexity or other reasons, the Court may appoint a referee with directions to conduct the proceedings authorized by this Rule acting as a Panel would under this Rule. The Court may also remand the matter to a Panel under this Rule with instructions or 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 the Ramsey County District Court shall not exercise such powers in such case. If the referee so appointed determines there is reasonable cause, 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 cause proceeding, the referee's determination from that proceeding shall be made part of the public record.

(f) Notice of Disposition. The Director shall notify the lawyer, the complainant, if any, and the District Ethics Committee, if any, of the Panel's disposition under this Rule. A notice to the complainant shall inform the complainant of the right to petition for review under subdivision (g) of this Rule. 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 (h) of this Rule.

(g) Complainant's Petition for Review. If not satisfied with the Panel's disposition, the complainant may within 30 days after the date of the Director's notice under subdivision (f) of this Rule file with the Clerk of the Appellate Courts a petition for review. The complainant shall, prior to or at the time of filing, serve a copy of the petition for review upon the lawyer and the Director and file an affidavit of service with the Clerk of the Appellate Courts. The lawyer shall be denominated by randomly selected initials in the proceeding, which shall be captioned "In re Panel Proceeding Number []" and reference the Director's file number for the matter. This Court will grant 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, this 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 a petition for revocation of conditional admission, or take any other action as the interest of justice may require.

(h) Lawyer's Appeal to Supreme Court. The lawyer may appeal a Panel's affirmance of the Director's admonition or an admonition issued by a Panel by filing a notice of appeal, with proof of service, with the Clerk of the Appellate Courts and serving a copy on the Director within 30 days after the date of the Director's notice under subdivision (f) of this Rule. The lawyer shall be denominated by randomly selected initials in the proceeding, which shall be captioned "In re Panel Proceeding Number []" and reference the Director's file number for the matter. The Director shall notify the complainant, if any, of the lawyer's appeal. This Court may review the matter on the existing record or order such further proceedings as it deems appropriate. Upon conclusion of such proceedings, this Court may either affirm the decision or make such other disposition as it deems appropriate.

(i) Manner of Recording. When a hearing is held under this Rule, an official court record by a court reporter shall be made as in civil cases.

2024 Advisory Committee Comment

The amendments adopted on [date] require a Panel acting under subdivision (a) of this rule to make a cause determination based on "reasonable cause", which is now defined in Rule 1(12), RLPR. Previously, Rule 9 used "probable cause" as the standard for the panel's determination, and "probable cause" was undefined in the rules. The two standards have been interpreted similarly, with reasonable cause used more often in the civil context. *See Wall v. Fairview Hosp. & Healthcare. Servs.*, 584 N.W.2d 395, 406 (Minn. 1998) (noting in the context of a civil action

under the Vulnerable Adults Act that "reasonable cause" means "probable cause" in a criminal case, and the terms have been used synonymously); *State v. Childs*, 269 N.W.2d 25, 27 (Minn. 1978) ("Reasonable cause is, of course, synonymous with probable cause."); *In re Schultz*, 375 N.W.2d 509, 513 (Minn. Ct. App. 1985) (applying a probable cause standard in a dental discipline matter).

Discussion.

Summary. The Committee believes it has achieved the Court's objectives with respect to the procedures authorized by Rule 9: defining the reasonable-cause standard, Aug. 23 Order at 13; streamlining the proceedings by limiting discovery where appropriate to do so; and avoiding a duplication of any later merits proceedings except under exceptional circumstances, *id*. at 14–16.[11]

The reasonable-cause definition is now found in Rule 1, RLPR, and the language of Rule 9 now refers to that definition, *see supra* at 15 (Rule 9(a)(2), RLPR, as amended, requires the Panel to determine if "reasonable cause *as defined in Rule 1(12)* exists" (emphasis added)). The Committee intentionally used terms in this definition that will be accessible to Panel members (lawyer and public members) as well as to lawyers who appear before the Panel. For example, the definition refers to "a person of ordinary care and prudence" and an "impression" that alleged misconduct occurred, terms that the Committee found to be easily understandable and in the case of "impression," less subjective than "suspicion." Further, paragraph 9(a)(3) explicitly states that the cause determination "is not a decision on the merits."[12] *Id*. at 15; *see* Aug. 23 Order at 13 (agreeing with the ABA "that our rules should 'make clear' that the panel's role is '**not** to reach a

[11] The proposed amendments reduce Rule 9 considerably, in part by limiting the discovery options in admonition appeals and requiring early discussion and planning by the lawyer and the Director, *compare* Rule 9(c)(2)–(3), RLPR, *supra* at 15–16 (requiring the parties to "confer regarding the need for and use of" discovery in an admonition appeal and prohibiting interrogatories, requests for admission, and expert depositions absent exceptional circumstances), *with* Rule 9(c)–(d), RLPR (allowing either party to serve requests for admission and take depositions). The Committee recommends eliminating other provisions because they are better captured in Panel training materials, *see* Rule 9(h)–(i), RLPR (describing the "form of evidence" at Panel hearings and the order of presentations at a hearing, both of which are eliminated in the proposed amendments).

[12] The Committee does not recommend retaining the clause from paragraph (j)(1)(ii) in the current rule, which prohibits the Panel from making "a recommendation as to the matter's ultimate disposition," because that direction is better located in Panel training materials.

decision on the merits' . . . when making a cause determination"). Nonetheless, by asking whether "alleged misconduct occurred," the Committee concluded that the reasonable-cause definition will appropriately focus the Panel's attention on the facts alleged in the Director's charges, and whether those facts would be misconduct.

The Committee also concluded that transparency and guidance would be enhanced with a definition of "count," which is the term used in public petitions to designate "an alleged course of unprofessional conduct" that is alleged to violate "one or more professional conduct rules." *Supra* at 8 (Rule 1(3), RLPR, as amended). This definition was useful when the Committee considered the Board's petition to amend Rule 9 by incorporating the rule of law from this court's decision in *In re Review of Panel Decision No. 35104*, 851 N.W.2d 620, 625 (Minn. 2014) (holding that the Panel cannot bifurcate multiple alleged rule violations into public and non-public discipline). With a definition of "count," the Director, the lawyer, and panels have greater clarity and guidance when reviewing multi-count allegations of misconduct.

Next, the procedures in Rule 9 are streamlined to enhance clarity, limit the adversarial nature of the proceedings when appropriate to do so, and provide guidance to lawyers, the Panel, and the Office. As the Court noted, the current procedures in Rule 9 are "elaborate," Aug. 2023 Order at 13 (quoting the ABA's comment that the procedures are "unnecessarily elaborate"). The Committee began by organizing the authorized procedures according to the Director's disposition alternatives under Rule 8(d), RLPR.[13] *See supra* at 15 (Rule 9(a), RLPR, as amended, authorizes cause proceedings when "a matter is submitted to a Panel under" Rule 8(d)(4)(i), (iii) of the Rules, while Rule 9(b), RLPR, as amended, is invoked when the Director proceeds under Rule 8(d)(4)(iv)). Thus, if the Director submits a matter to the Panel under Rule 8(d)(4)(i) or (iii), the procedure authorized by Rule 9 is one to determine whether the Director has reasonable cause to

[13] The Panel retains its admonition authority as a possible disposition in the cause proceeding. *See* Aug. 2023 Order at 15 (stating that the court "will retain the panel's admonition authority"). This disposition requires the Panel to make findings based on the parties' submissions, specifically, finding (a) clear and convincing evidence (b) that misconduct occurred, (c) which is of an isolated and non-serious nature. Even without discovery, a hearing, or oral argument, the Committee believes the parties' submissions will allow a Panel to distinguish between misconduct that warrants a finding of reasonable cause for public charges, and misconduct that is better addressed through an exercise of the Panel's admonition authority. Finally, paragraph (h) preserves the lawyer's right to appeal the Panel's decision to admonish the lawyer.

pursue public discipline. If the Director submits a matter to the Panel under Rule 8(d)(2)(iii), the procedure authorized by Rule 9 is an admonition appeal.

Because reasonable cause proceedings are not a decision on the merits, paragraph (a) provides a relatively short disposition timeframe, requiring the Panel to decide whether cause exists within 40 days after the lawyer is notified of the Director's proposed charges. Further, because the Panel's cause decision is presumed to be made solely based on the parties' submissions—which are done without discovery[14]—arguments and hearings are not held absent "exceptional circumstances." If those circumstances exist, paragraph (a)(2) directs the Panel Chair to set the procedures that will govern the argument or hearing.

Language in paragraph (a) has also been updated and enhanced for clarity and guidance; for example, the lawyer's Answer (provided within 14 days after being notified of the charges) must "admit, deny, or otherwise respond" to each allegation in the Director's charges. A hearing can be requested only if the lawyer includes with that request "evidence or information supporting an assertion of" the exceptional circumstances that demonstrate the need for a hearing. *Supra* at 15 (Rule 9(a)(1)-(2), RLPR). Paragraph (a)(3) clearly directs the Panel to either find reasonable cause or find no reasonable cause "as to each count in the Charges," and requires the Director to file a petition with this court "for each count on which [the Panel] finds reasonable cause." *Id*. A Panel could also issue an admonition if it finds "clear and convincing evidence" of misconduct of an isolated and non-serious nature, though it cannot do so if it finds reasonable cause as to any other count in the Charges. *Id.* (Rule 9(a)(4)).[15]

An admonition appeal, on the other hand, benefits from more detailed procedures. Unlike a reasonable cause determination, which considers only whether the Director has shown cause that amounts to a "strong impression that the alleged misconduct occurred," *supra* at 8 (Rule 1(12),

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[14] Of course, if cause is found and a public petition is filed and assigned to a referee, all discovery procedures are available to the parties for that next stage. Rule 14(a), RLPR (requiring the referee appointed after a petition is filed to "hear all the evidence" for and against the charges).

[15] The Committee considered whether to move the admonition disposition to a separate rule. *See* Aug. 2023 Order at 15 (questioning "whether combining . . . separate, but functionally different, dispositions in a single paragraph is necessary or useful," asking the committee to consider "how best to arrange the panel functions" to achieve the Court's stated objectives). Ultimately, the Committee decided that clarity and transparency favor retaining in a single rule all dispositions for the procedures that come before a Panel from Rule 8(d)(4), RLPR.

RLPR (as amended)), an admonition appeal requires that the Director prove the allegations in the admonition by clear and convincing evidence. In this posture, the Director has concluded after an investigation that "a lawyer's conduct was unprofessional but of an isolated and non-serious nature" and admonished the lawyer. Rule 8(d)(2), RLPR. The lawyer is entitled to challenge that determination by requesting de novo consideration by a Panel. Rule 8(d)(2)(iii), RLPR. Thus, the proposed amendments for an admonition appeal require an early meeting between the parties to discuss discovery needs and a schedule for submissions to the Panel, all of which the Panel then captures in a scheduling order. Rule 9(c)(1)–(2), RLPR, *supra* at 15–16. Even with the possibility of discovery, the proposed amendments contemplate a hearing within "120 days after the lawyer's Answer is submitted" to the Panel and the Director. *Id*. While document requests and non-expert depositions are allowed, interrogatories, requests for admission, and expert depositions are not allowed, "[a]bsent exceptional circumstances." *Id*. This paragraph concludes by stating the available dispositions: "affirm the admonition if there is clear and convincing evidence" of the requisite misconduct, "reverse the admonition" if that evidence is "lacking," or if "reasonable cause" exists to believe "that public discipline is warranted," the Panel can require the Director to file a public petition for discipline. Rule 9(c)(5), RLPR, *supra* at 16.

The remaining procedures in the Rule—a referee appointment, a complainant's petition for review, and a lawyer's appeal from an admonition—remain largely unchanged. *Compare* Rule 9(e), (g)–(h), RLPR, *supra* at 16–17, *with* Rule 9(g), (l)–(m), RLPR. Note, however, that the Committee recommends consistency in the appeal periods provided to the complainant and the lawyer: both should have 30 days. Rule 9(g)–(h), RLPR, *supra* at 16–17. Apart from this recommended change, these provisions were carried over with little or no changes because they capture the generally applicable procedures that, to the Committee's understanding, work well for the Rule 8 dispositions that come before panels——cause proceedings, admonition appeals, revocations of conditional admission—and proceedings that come before this court (appeals).

The Board's Petition. The Board's proposed amendments to Rule 9 are, for the most part, found in the Committee's recommended amendments. The Board's proposal to place panel assignment authority with the Board chair, Board 2023 Pet'n at 11, is captured in the amendments to paragraphs (a)(1), (c)(1). The Board's proposal to change references to a pre-hearing "meeting" to "conference" have been included, references to the Rules of Civil Procedure have been updated

as proposed by the Board, and as noted above, the proposed language adopting the court's 2014 *Panel* decision is included. *See* Board 2023 Pet'n at 11–14. The need for some of the Board's proposed amendments to Rule 9 diminished with the Committee's proposed amendments and restructuring of the Rule 9. For example, the changes the Board sought to current Rule 9(e), RLPR, on a panel hearing, are effectively captured, though in different language, in the Committee's recommended amendments to paragraph 9(c). Thus, other than one proposed amendment that the Committee does not recommend, the Board's proposed amendments to Rule 9 have been included with the Committee's recommendation.

The Board proposed amending Rule 9 to allow a Panel to make cause determinations "separately with respect to each charge." Board 2023 Pet'n at 14. To the extent that this amendment would have codified the ability to decide whether conduct violated a specific rule, the Committee, after a robust and thorough debate over a few meetings, disagreed with the Board's request. Instead, the Committee recommends that the Panel be permitted to make a count-by-count determination of reasonable cause, using the broad definition of "count" in the proposed amendment to Rule 1. Rule 1(3), *supra* at 8. The Committee concluded that this approach would clarify how reasonable cause determinations are made.

Remaining Considerations. First, the subcommittee's research confirmed that "reasonable cause" has a meaning sufficiently similar to "probable cause," but the recommended definition (in Rule 1) uses terms ("ordinary care and prudence" and "strong impression") that may suggest case law developed under the probable cause standard is no longer relevant. The Committee does not intend, with the proposed definition, to recommend that there be a change to the controlling law. Thus, for guidance and clarity as lawyers, the Board, and the Office move to the reasonable cause standard, the Committee recommends that an Advisory Committee comment be included with Rule 9, as follows:

> The amendments adopted on [date] require a Panel acting under subdivision (a) of this rule to make a cause determination based on "reasonable cause," which is now defined in Rule 1(12), RLPR. Previously, Rule 9 used "probable cause" as the standard for the Panel's determination, and probable cause was undefined in the rules. The two standards have been interpreted similarly, with reasonable cause used more often in the civil context. *See Wall v. Fairview Hosp. & Healthcare. Servs.*, 584 N.W.2d 395, 406 (Minn. 1998) (noting in the context of a civil action under the Vulnerable Adults Act that "reasonable cause" means "probable cause" in a criminal case, and the terms have been used synonymously); *State v. Childs*,

269 N.W.2d 25, 27 (Minn. 1978) ("Reasonable cause is, of course, synonymous with probable cause."); *In re Schultz*, 375 N.W.2d 509, 513 (Minn. Ct. App. 1985) (applying probable cause standard in a dental discipline matter).

Second, the Committee's proposed amendments make significant changes to Rule 9, but the majority of those changes restructure the rule. Further, the procedures that currently come before panels—cause determinations, admonition appeals—will continue to come before panels. Thus, actual procedures will not change significantly. Other than limiting discovery in admonition appeals and limiting hearings in cause determinations to "exceptional circumstances," many of the steps taken by the parties or the Panel will remain the same. The proposed Advisory Committee Comment will also aid in ensuring that everyone approaches the cause determination with the same legal standard in mind.

With these factors in mind, the Committee recommends that the amendments to Rule 9 be made effective upon adoption and applied to proceedings initiated before a Panel on or after the effective date. The Committee recognizes that this approach will require Panels to operate, for some period of time, using two different rules: proceedings that are initiated before the effective date will be conducted under current Rule 9, while proceedings brought before a panel on or after the effective date will be conducted under the rule as amended. The Director's Office is not concerned with this result and, ultimately, the number of cases that fall under the current rule will continually diminish as the number of cases conducted under the amended rule increases. Given the clarity and guidance provided by the rule as amended, the Committee concluded that the benefits of an earlier adoption and application of Rule 9 as amended outweigh the limited challenges that might arise, for a limited period of time, in applying two versions of the rule.

The Committee recommends the same effective date for the proposed amendments to Rule 1: immediately upon adoption and applied to all charges brought before a Panel on or after the effective date, and to complaints received on or after the effective date.

2. Rule 18 should be amended to authorize reinstatement by affidavit for suspensions of 6 months or less and provide guidance on the materials and conditions required for reinstatement.

Introduction.

Currently, a lawyer suspended for 90 days or less may be reinstated by filing an affidavit with the court, Rule 18(f), RLPR, while a lawyer suspended for a longer period of time must petition for reinstatement; appear for an evidentiary hearing before a Board panel; and, unless the parties stipulate to the Panel's recommendation, appear before the court. Rule 18(a)–(d), RLPR. The court adopted the ABA's recommendation to extend the length of time a lawyer may be suspended and seek reinstatement by affidavit from 90 days to 6 months. Aug. 2023 Order at 21. In addition, the court asked the Committee to "include detail in [Rule 18] on the information and materials that must be submitted with an affidavit or petition," *id.*, at 18, as well as "proposed language" on the requirement to show moral change for reinstatement, *id*. at 17; *see In re Trombley*, 947 N.W.2d 242, 245–46 (Minn. 2020) (explaining the moral change requirement).

As noted above, given the significance of the changes needed to the reinstatement process, the Committee discussed proposed amendments to Rule 18 at each meeting. In November 2023, Director Susan Humiston and committee member Eric Cooperstein provided the Committee with an overview of the reinstatement process that included, among other tools, a flowchart of the current reinstatement process. Exh. A, Nov. 20, 2023 Mtg. Agenda. From this presentation, the Committee focused on two important steps in the process. First, securing an affidavit or petition that accurately represents the lawyer's compliance with the notice requirements in Rule 26 and CLE requirements, *see* Rule 18(f), RLPR (requiring lawyer seeking reinstatement by affidavit to be "current in CLE requirements"); Rule 26(g), RLPR (stating that compliance with the Rule "is a condition precedent to any petition or affidavit for reinstatement"). Second, recognizing that the

process of gathering the information needed for the Director's investigation, Rule 18(b)(2), RLPR, largely occurs *after* a petition is filed, the Committee concluded that educating lawyers on the information to submit with an affidavit or petition would increase transparency and efficiency and encourage the suspended lawyer to reach out to the Office early in the process for directions on the work that needs to be done *before* filing the affidavit or petition. This guidance will aid the lawyer, who needs to know the detailed requirements for reinstatement and the Director, who needs to know, based on the lawyer's affidavit or petition, whether to support or oppose a requested reinstatement. Finally, early work on the reinstatement process will aid the panel, as it reviews the submissions from the lawyer and the Director, to prepare for a hearing and make recommendations on the requested reinstatement.

Specific Recommendations.

RULE 18. REINSTATEMENT[16]

(a) ~~Petition for~~ Reinstatement By Affidavit. Unless the Court orders otherwise when imposing discipline, a lawyer suspended as a result of a disciplinary proceeding for 180 days or less, who has not been previously suspended, may seek reinstatement by filing an affidavit with the Clerk of the Appellate Courts, attesting that the requirements for reinstatement in paragraph (e)(1) of this Rule have been satisfied, and serving ~~A copy of~~ a copy of the affidavit ~~a petition~~ for reinstatement ~~to practice law shall be served up~~on the Director. Serving the affidavit by U.S. M~~m~~ail or email is sufficient. ~~The petition, with~~ Pproof of service of the affidavit~~,~~ 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 in the same amount as that required by Rule 12(B), Rules for Admission to the Bar, for timely filings. Applications for admission to the bar following a revocation of conditional admission shall be filed with the Board of Law Examiners pursuant to Rule 16, Rules for Admission to the Bar.~~

(b) Reinstatement By Petition.

(1) Unless the Court orders otherwise when imposing discipline, a lawyer who has been disbarred or who has been suspended as a result of a disciplinary proceeding for longer than 180 days may seek reinstatement by filing a petition with the Clerk of the Appellate Courts, attesting that the requirements for reinstatement in paragraph (e)(2) of this Rule have been satisfied, and

16 A clean version of Rule 18 is found at page 30 of this report.

serving a copy of that petition on the Director. Serving the petition by U.S. Mail or email is sufficient. Proof of service of the petition shall be filed with this Court.

(2) Together with the petition, the lawyer must pay to the Director a fee in the same amount as that required by Rule 12(B), Rules for Admission to the Bar, for timely filings.

(3) The petition must include a statement confirming that the lawyer has obtained, completed, and submitted to the Director the Director's Reinstatement Questionnaire for Discipline Matters.

(c) Reinstatement Following Resignation from the Bar or Transfer to Disability Inactive Status. Application for reinstatement following resignation from the bar or transfer to disability inactive status under Rule 28 of these rules shall be made by petition filed with the Clerk of the Appellate Courts and serving a copy of the petition on the Director. Serving the petition by U.S. Mail is sufficient. Proof of service of the petition shall be filed with this Court. Together with the petition, the lawyer must pay to the Director a fee in the same amount as is required by Rule 12(b), Rules for Admission to the Bar, for timely filings. The petition must include a statement confirming that the lawyer has obtained, completed, and submitted to the Director the Director's Reinstatement Questionnaire for Resignation Matters, or the Director's Reinstatement Questionnaire for Transfer from Disability Inactive Status.

(d) Application for Admission Following Revocation of Conditional Admission. Application for admission to the bar following a revocation of conditional admission shall be filed with the Board of Law Examiners pursuant to Rule 16, Rules for Admission to the Bar.

(e) General Requirements for Reinstatement.

(1) Reinstatement by affidavit. An affidavit for reinstatement filed under paragraph (a) of this rule must demonstrate 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. The affidavit for reinstatement may be filed no sooner than 14 days before the suspension period ends. Within 7 days after service of an affidavit that complies with the requirements of this paragraph, the Director shall file, and serve on the lawyer, a statement that addresses the lawyer's requested reinstatement including the compliance or lack thereof with the requirements for reinstatement, along with a proposed order. The lawyer may not resume the practice of law unless and until this Court issues a reinstatement order.

(2) Reinstatement by petition. A disbarred or suspended lawyer who files a petition for reinstatement under paragraph (b) of this rule may file the petition no sooner than 60 days before the end of the suspension period. The petition must state that the lawyer is prepared to demonstrate, by clear and convincing evidence, satisfaction of the requirements in this paragraph for reinstatement. Within 30 days after service of a petition that complies with paragraph (b) of this Rule, the Director shall file, and serve on the lawyer, a statement addressing whether the requested reinstatement is opposed. To be reinstated, a suspended or disbarred lawyer must prove by clear and convincing evidence:

(i) That the lawyer has undergone moral change, meaning that the lawyer must show (i) remorse and acceptance of responsibility for the lawyer's misconduct; (ii) a

change in the lawyer's conduct and state of mind that corrects the underlying misconduct that led to the suspension or disbarment; and (iii) a renewed commitment to the ethical practice of law; and

(ii) That the lawyer has the intellectual competence to practice law; and

(iii) That the lawyer has complied with the conditions of suspension or disbarment imposed by the court; and

(iv) That the lawyer has complied with Rules 24 and 26 of these rules, is current in Continuing Legal Education requirements, and has complied with the requirements of this Rule 18.

(3) Reinstatement following Resignation or Transfer to Disability Inactive Status. A petition for reinstatement following resignation from the bar or transfer to disability inactive status under Rule 28 of these rules, filed under paragraph (c) of this rule, must demonstrate by clear and convincing evidence that the lawyer has the necessary competence, fitness, and character to practice law and is current in Continuing Legal Education requirements.

(4) Additional Requirement for Reinstatement after Disbarment. Unless such examination is specifically waived by this Court, no lawyer, after having been disbarred by this Court, may petition for reinstatement until the lawyer has successfully completed and has a valid score on such written examinations as may be required of applicants for admission to the practice of law by the State Board of Law Examiners.

(5) Unless specifically waived by this Court, no lawyer shall be reinstated to the practice of law following disbarment, suspension, resignation, or transfer to disability inactive status under Rule 28 of these rules until the lawyer has satisfied any subrogation claim against the lawyer by the Client Security Board.

(f) Investigation of Petitions; Report.

(1) The Director shall publish an announcement of a ~~the~~ petition for reinstatement in a publication of general statewide circulation to attorneys, soliciting comments regarding the appropriateness of the petitioner's reinstatement. Any comments made in response to such a solicitation shall be absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person making the statement.

(2) The Director shall investigate the petition for reinstatement. The Director shall meet with the lawyer and disclose the results of the Director's investigation, before ~~and~~ reporting the Director's investigation and conclusions to a Panel. The Director's Report of the investigation shall be filed with the Court following the conclusion of the Panel proceedings.

(g) Proceedings Before the Panel~~Recommendation~~.

(1) Upon the Clerk of the Appellate Court's docketing of a petition for reinstatement and assignment of a court file number, the Director shall provide notice to the Board Chair of the petition. The Board Chair shall assign the matter to a Panel and provide notice to the Director and petitioner of the assignment.

(2) Following receipt of the required statement from the Director under (e)(2), the Panel Chair shall notify the petitioner and the Director of the date for a pre-hearing scheduling conference. Prior to the scheduling conference, petitioner and the Director shall confer to identify mutually agreeable dates when the parties, their counsel, if any, and their witnesses will be available for a hearing before the Panel, and when the parties will make written submissions to the Panel. The Panel Chair shall issue a scheduling order with a date certain for the hearing to be held before the Panel, and for any further pre-hearing conferences as the Panel Chair deems necessary for the fair and efficient disposition of the petition. The Scheduling Order may be modified for good cause shown upon motion made orally or in writing more than thirty days before the date of the panel hearing. Any motion to modify the scheduling order that is made less than 30 days before the panel hearing may only be granted upon a showing of exceptional circumstances or to prevent a manifest injustice.

(3) The Panel shall conduct a hearing on a petition for reinstatement filed under paragraphs (b)–(c) of this rule. The Panel may waive the hearing for a petition for reinstatement filed under paragraph (c) of this rule. The Panel ~~may conduct a hearing and~~ shall make its findings of fact, conclusions, and recommendations, which ~~. The recommendations~~ shall be served upon the petitioner and the Director, and filed with this Court. Unless the petitioner or Director, within ten days of the date of service, orders a transcript and so notifies this Court as set forth in paragraph (h), the Panel's findings of fact and conclusions shall be conclusive. If either the petitioner 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.

(h) Proceedings ~~Hearing~~ Before the Court. A party ordering a transcript of the proceedings before the Panel shall, within ten days of the date the transcript is ordered, file with the clerk of the 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. A party ordering a transcript shall order and pay for an original transcript for the Court plus two copies, one for the petitioner and one for the Director. Failure to timely confirm that satisfactory financial arrangements have been made for the transcription shall result in the Panel's findings of fact and conclusions being deemed conclusive. No later than the time for filing the certificate as to transcript referenced in this rule, or if no transcript is ordered, promptly upon the conclusion of the ten-day period referenced in this rule, each party shall file with the Clerk of Appellate Courts the exhibits received into evidence at the Panel hearing, and the Director's Report of Investigation referenced in paragraph (f). At the same time, the Director shall also notify the Court, by a written request filed with the Clerk of Appellate Courts, whether a briefing schedule is needed. The Court shall issue an order notifying the parties of the briefing schedule. A party ordering a transcript shall specify in the initial brief to the Court the Panel's findings of fact, conclusions, and recommendations that are disputed.

Unless the Court orders otherwise, ~~There shall be~~ a hearing will be held before this Court on the petition ~~unless otherwise ordered by this Court~~. Should this Court determine further consideration on the petition is necessary, this Court may appoint a referee and the same procedure shall be followed as under Rule 14, except subdivision (f) will not apply.

(e) General Requirements for Reinstatement.

(1) Unless such examination is specifically waived by this Court, no lawyer, after having been disbarred by this Court, may petition for reinstatement 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 ninety (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 resignation, 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 ninety (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.

[*Rule 18, clean version, with recommended amendments adopted*]

RULE 18. REINSTATEMENT

(a) Reinstatement By Affidavit. Unless the Court orders otherwise when imposing discipline, a lawyer suspended as a result of a disciplinary proceeding for 180 days or less, who has not been previously suspended, may seek reinstatement by filing an affidavit with the Clerk of the Appellate Courts, attesting that the requirements for reinstatement in paragraph (e)(1) of this Rule have been satisfied, and serving a copy of the affidavit for reinstatement on the Director. Serving the affidavit by U.S. Mail or email is sufficient. Proof of service of the affidavit shall be filed with this Court.

(b) Reinstatement By Petition.

(1) Unless the Court orders otherwise when imposing discipline, a lawyer who has been disbarred or who has been suspended as a result of a disciplinary proceeding for longer than 180 days may seek reinstatement by filing a petition with the Clerk of the Appellate Courts, attesting that the requirements for reinstatement in paragraph (e)(2) of this Rule have been satisfied, and serving a copy of that petition on the Director. Serving the petition by U.S. Mail or email is sufficient. Proof of service of the petition shall be filed with this Court.

(2) Together with the petition, the lawyer must pay to the Director a fee in the same amount as that required by Rule 12(B), Rules for Admission to the Bar, for timely filings.

(3) The petition must include a statement confirming that the lawyer has obtained, completed, and submitted to the Director the Director's Reinstatement Questionnaire for Discipline Matters.

(c) Reinstatement Following Resignation from the Bar or Transfer to Disability Inactive Status. Application for reinstatement following resignation from the bar or transfer to disability inactive status under Rule 28 of these rules shall be made by petition filed with the Clerk of the Appellate Courts and serving a copy of the petition on the Director. Serving the petition by U.S. Mail is sufficient. Proof of service of the petition shall be filed with this Court. Together with the petition, the lawyer must pay to the Director a fee in the same amount as is required by Rule 12(b), Rules for Admission to the Bar, for timely filings. The petition must include a statement confirming that the lawyer has obtained, completed, and submitted to the Director the Director's Reinstatement Questionnaire for Resignation Matters, or the Director's Reinstatement Questionnaire for Transfer from Disability Inactive Status.

(d) Application for Admission Following Revocation of Conditional Admission. Application for admission to the bar following a revocation of conditional admission shall be filed with the Board of Law Examiners pursuant to Rule 16, Rules for Admission to the Bar.

(e) General Requirements for Reinstatement.

(1) Reinstatement by affidavit. An affidavit for reinstatement filed under paragraph (a) of this rule must demonstrate 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. The affidavit for reinstatement may be filed no sooner than 14 days before the suspension period ends. Within 7 days after service of an affidavit that complies with the requirements of this paragraph, the Director shall file, and serve

on the lawyer, a statement that addresses the lawyer's requested reinstatement including the compliance or lack thereof with the requirements for reinstatement, along with a proposed order. The lawyer may not resume the practice of law unless and until this Court issues a reinstatement order.

(2) Reinstatement by petition. A disbarred or suspended lawyer who files a petition for reinstatement under paragraph (b) of this rule may file the petition no sooner than 60 days before the end of the suspension period. The petition must state that the lawyer is prepared to demonstrate, by clear and convincing evidence, satisfaction of the requirements in this paragraph for reinstatement. Within 30 days after service of a petition that complies with paragraph (b) of this Rule, the Director shall file, and serve on the lawyer, a statement addressing whether the requested reinstatement is opposed. To be reinstated, a suspended or disbarred lawyer must prove by clear and convincing evidence:

(i) That the lawyer has undergone moral change, meaning that the lawyer must show (i) remorse and acceptance of responsibility for the lawyer's misconduct; (ii) a change in the lawyer's conduct and state of mind that corrects the underlying misconduct that led to the suspension or disbarment; and (iii) a renewed commitment to the ethical practice of law; and

(ii) That the lawyer has the intellectual competence to practice law; and

(iii) That the lawyer has complied with the conditions of suspension or disbarment imposed by the court; and

(iv) That the lawyer has complied with Rules 24 and 26 of these rules, is current in Continuing Legal Education requirements, and has complied with the requirements of this Rule 18.

(3) Reinstatement following Resignation or Transfer to Disability Inactive Status. A petition for reinstatement following resignation from the bar or transfer to disability inactive status under Rule 28 of these rules, filed under paragraph (c) of this rule, must demonstrate by clear and convincing evidence that the lawyer has the necessary competence, fitness, and character to practice law, and is current in Continuing Legal Education requirements.

(4) Additional Requirement for Reinstatement after Disbarment. Unless such examination is specifically waived by this Court, no lawyer, after having been disbarred by this Court, may petition for reinstatement until the lawyer has successfully completed and has a valid score on such written examinations as may be required of applicants for admission to the practice of law by the State Board of Law Examiners.

(5) Unless specifically waived by this Court, no lawyer shall be reinstated to the practice of law following disbarment, suspension, resignation, or transfer to disability inactive status under Rule 28 of these rules until the lawyer has satisfied any subrogation claim against the lawyer by the Client Security Board.

(f) Investigation of Petitions; Report.

(1) The Director shall publish an announcement of a petition for reinstatement in a publication of general statewide circulation to attorneys, soliciting comments regarding the appropriateness of the petitioner's reinstatement. Any comments made in response to such a solicitation shall be absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person making the statement.

(2) The Director shall investigate the petition for reinstatement. The Director shall meet with the lawyer and disclose the results of the Director's investigation, before reporting the Director's investigation and conclusions to a Panel. The Director's Report of the investigation shall be filed with the Court following the conclusion of the Panel proceedings.

(g) Proceedings Before the Panel.

(1) Upon the Clerk of the Appellate Court's docketing of a petition for reinstatement and assignment of a court file number, the Director shall provide notice to the Board Chair of the petition. The Board Chair shall assign the matter to a Panel and provide notice to the Director and petitioner of the assignment.

(2) Following receipt of the required statement from the Director under (e)(2), the Panel Chair shall notify the petitioner and the Director of the date for a pre-hearing scheduling conference. Prior to the scheduling conference, petitioner and the Director shall confer to identify mutually agreeable dates when the parties, their counsel, if any, and their witnesses will be available for a hearing before the Panel, and when the parties will make written submissions to the Panel. The Panel Chair shall issue a scheduling order with a date certain for the hearing to be held before the Panel, and for any further pre-hearing conferences as the Panel Chair deems necessary for the fair and efficient disposition of the petition. The Scheduling Order may be modified for good cause shown upon motion made orally or in writing more than thirty days before the date of the panel hearing. Any motion to modify the scheduling order that is made less than 30 days before the panel hearing may only be granted upon a showing of exceptional circumstances or to prevent a manifest injustice.

(3) The Panel shall conduct a hearing on a petition for reinstatement filed under paragraphs (b)–(c) of this rule. The Panel may waive the hearing for a petition for reinstatement filed under paragraph (c) of this rule. The Panel shall make its findings of fact, conclusions, and recommendations, which shall be served upon the petitioner and the Director, and filed with this Court. Unless the petitioner or Director, within ten days of the date of service, orders a transcript and so notifies this Court as set forth in paragraph (h), the Panel's findings of fact and conclusions shall be conclusive. If either the petitioner 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.

(h) Proceedings Before the Court. A party ordering a transcript of the proceedings before the Panel shall, within ten days of the date the transcript is ordered, file with the clerk of the 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. A party ordering a transcript shall order and pay for an original transcript for the Court plus two copies, one for the petitioner and one for the Director. Failure to timely confirm that satisfactory financial arrangements have been made for the

transcription shall result in the Panel's findings of fact and conclusions being deemed conclusive. No later than the time for filing the certificate as to transcript referenced in this rule, or if no transcript is ordered, promptly upon the conclusion of the ten-day period referenced in this rule, each party shall file with the Clerk of Appellate Courts the exhibits received into evidence at the Panel hearing, and the Director's Report of Investigation referenced in paragraph (f). At the same time, the Director shall also notify the Court, by a written request filed with the Clerk of Appellate Courts, whether a briefing schedule is needed. The Court shall issue an order notifying the parties of the briefing schedule. A party ordering a transcript shall specify in the initial brief to the Court the Panel's findings of fact, conclusions, and recommendations that are disputed.

Unless the Court orders otherwise, a hearing will be held before this Court on the petition. Should this Court determine further consideration on the petition is necessary, this Court may appoint a referee and the same procedure shall be followed as under Rule 14, except subdivision (f) will not apply.

Discussion.

Summary. The Committee believes the restructuring of Rule 18 shown above, which groups reinstatement by category (by affidavit or by petition), will provide clarity and guidance to those who seek reinstatement. Further, recognizing that suspended lawyers should be aware of the work that needs to be done for reinstatement ***before*** an affidavit or petition is filed, the Committee added details to the rule that will help assist and guide lawyers during the suspension period and when reinstatement is sought.

The court looked for "recommendations on the wording of the" standard for reinstatement by petition. Aug. 2023 Order at 21 & n.14. The Committee recommends establishing a dividing line between reinstatement by petition, versus reinstatement by affidavit, by stating these periods in days, i.e., "180 days or less," rather than months. The Committee concluded that greater certainty is achieved with a period stated in days, particularly for a suspension that starts in the middle of a month. Computing a suspension period in days is also consistent with timing periods throughout the court's rules, especially those that govern the computation of time. *E.g.*, Minn. R. Civ. P. 6.01.

Next, the language of paragraphs (a)–(b) retains flexibility for the court to exercise its discretion when imposing suspension terms ("Unless the court orders otherwise"), and the proposed amendments incorporate the conditions the court announced in its order (allowing

reinstatement by affidavit for a lawyer who "has not previously been suspended").[17] Specifically, paragraph (a) includes a clause that excludes lawyers "who [have] . . . been previously suspended" from seeking reinstatement by filing an affidavit, and paragraph (e)(2) includes moral change and intellectual competency among the requirements for reinstatement from a suspension that is longer than 180 days. *See* Aug. 2023 Order at 17–18, 22 (directing the committee to include a moral change requirement and guidance in the rule on "the specific materials" to include when seeking reinstatement and announcing that "a lawyer who has been suspended previously, for any period, will be required to petition for reinstatement"). Deadlines are also included for a response from the Director. Rule 18(e)(1)–(2), RLPR, *supra* at 31 (requiring a response from the Director within 7 days after a compliant affidavit is served, and within 30 days after a compliant petition is served); *see* Aug. 2023 Order at 23 (concluding that "specific deadlines must be part of Rule 18" for "transparency in the Director's process").

Based on the overview of the reinstatement process provided by committee members Susan Humiston and Eric Cooperstein, the Committee understood that the lawyer's early disclosure of the information the Director needs for investigation will contribute to an efficient process. The Committee also reviewed approaches used in other states to gather information, from the lawyer or others, as part of the reinstatement process. *E.g.*, Colo. R. Civ. P., ch. 20, pt. IX, rule 242.39(b)(3) (contents of petition for reinstatement); Mass. Rules of the Bd. Of Bar Overseers, ch. 3, § 3.63 (requiring a reinstatement questionnaire). From these and other sources, committee members William Pentelovitch and Panhia Vang developed a checklist of required items for a reinstatement affidavit or petition, as well as a suggested questionnaire that the Director can use

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[17] Rule 18 currently refers to a "fixed" period of suspension, Rule 18(f), RLPR (referring to "lawyers who have been suspended for a fixed period of" time); *see* Aug. 2023 Order at 21 (referring to a "fixed period" in adopting the ABA recommendation on reinstatement by affidavit). The Committee recommends removing "fixed" from the rule. Reinstatement by petition (rather than by affidavit) has not been described in the rule based on a fixed period, and even when a lawyer is suspended for an indefinite period of time, a specific minimum suspension period is typically included. *See In re Walsh*, 872 N.W.2d 741, 750 (Minn 2015) (concluding that "an indefinite suspension with the right to petition for reinstatement after 6 months" was appr); *In re Schaefer*, 423 N.W.2d 680, 684 (Minn. 1988) (adopting referee's recommendation to suspend indefinitely without right to apply "for at least 6 months"). Even without "fixed" in the rule, the court has the flexibility to impose either specific or minimum suspension periods. *See, e.g.*, *In re Davisson*, 977 N.W.2d 861, 861 (Minn. 2022) (order) (imposing a suspension for a "minimum of 45 days"); *In re Ballard*, 976 N.W.2d 720, 720 (Minn. 2022) (order) (suspending with "no right to petition for reinstatement for 6 months").

with lawyers who seek reinstatement.[18] Exh. B, Jan. 20, 2024 Meeting Minutes. The proposed amendments include specific references to the "Director's Reinstatement Questionnaire" for "Discipline Matters," "Resignation Matters," or "Disability Inactive Status under Rule 28." Thus, the Committee believes the language of the rule will encourage lawyers to reach out to the Office early in the suspension period to obtain a checklist, review the relevant questionnaire, and begin the work needed for reinstatement. Similarly, through early contact with the Office and completion of a reinstatement questionnaire, the Committee believes "unnecessary delays in the process" can be alleviated. Aug. 2023 Order at 24.

Finally, the Committee has restructured the rule in a manner that promotes clarity and guidance. As with the recommended amendments to Rule 9, the Committee organized the rule by the manner in which reinstatement is sought (affidavit or petition), identified the materials needed for a compliant affidavit or petition, and then addressed the Director's investigation, the Panel proceedings, and the proceedings before the court. Separate paragraphs address the process for seeking reinstatement from resignation, from disability inactive status, or from revocation of conditional admission. Rule 18(c)–(d) (as proposed for amendment), 18(e)(3), RLPR.

The Board's Petition. The Board's proposed amendments to Rule 18, primarily with respect to the Panel proceedings, Board 2023 Pet'n at 21–22, are reflected in the Committee's recommended amendments to paragraph (g), Proceedings Before the Panel, *supra* at 32. The Board's proposed amendments provide detail on the pre-hearing scheduling conference held with the petitioner, the Director, and the Panel Chair. Similarly, the Committee's recommended amendments require the panel chair to hold a scheduling conference, which must be preceded by planning efforts between the Director and the petitioner. Thus, while the Board's proposed amendments are not captured verbatim in the Committee's recommended amendments, the Committee believes that the tenor of the Board's proposed amendments to Rule 18 are reflected in the Committee's recommendations.

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[18] The Committee designates these forms, *see* Exhibit H, as "suggested," because the Director will be responsible for putting each questionnaire into final form based on the proceeding (reinstatement, resignation, disability) for which it is used.

Remaining Considerations. The major consideration with the proposed amendments to Rule 18 is the effective date of any adopted amendments. The Committee considered a variety of delayed implementation dates for these amendments, but ultimately concluded that the amendments could be made effective immediately on adoption. As amended, Rule 18 would apply to lawyers suspended on or after the effective date and absent contrary directions in the court's order suspending the lawyer, those who petition for reinstatement after the effective date.

The Committee recognizes that this recommendation will result in two different rules effective at the same time, applying to different groups of suspended lawyers for some period of time. For example, lawyers suspended before the effective date would seek reinstatement according to the terms of the court's order based on *current* Rule 18. If the court suspended a lawyer for 4, 5, or 6 months in the weeks before the effective date of these amendments, presumably the court's order will state whether the lawyer can seek reinstatement by affidavit or must petition for reinstatement, under either the current or amended version of the rule. A lawyer suspended for 4, 5, or 6 months in the weeks immediately *after* the effective date of the amendments, however, could seek reinstatement by affidavit unless one of the exceptions applies or the court's order states otherwise.

Despite these challenges, the Committee concluded that this approach is manageable because the group of lawyers proceeding under the current (soon to be old) version of Rule 18 should be relatively small.[19] Further, the court has already announced that it will allow reinstatement by affidavit for lawyers suspended for 6 months or less (with some exceptions), which favors a quicker implementation date. The court could also impose suspension terms that it concludes are appropriate for the particular circumstances of the case, including waiving the petition process for reinstatement, as the public comment process on the recommended amendments unfolds. *See, e.g.*, *In re McCloud*, 998 N.W.2d 760, 771 (Minn. 2023) (suspending lawyer for 90 days and requiring reinstatement by petition); *In re Curott*, 989 N.W.2d 291, 292 (Minn. 2023) (order) (same); *In re Gardiner*, 986 N.W.2d 489, 490 (Minn. 2023) (order) (imposing 4-month suspension and waiving petition process for reinstatement); *In re Person*, 995 N.W.2d

[19] For example, of the 22 reported suspensions imposed in 2023 (excluding temporary suspensions and revoked conditional reinstatements), 6 lawyers were suspended for more than 90 days but less than 6 months—a term that may have allowed for reinstatement by affidavit, rather than by petition, under the rule announced in the August 2023 Order.

629, 630 (Minn. 2023) (order) (same). The Director's Office can also look to the Committee's recommended amendments to the reinstatement process as it frames its recommendations for discipline.

Ultimately, the Committee concluded that there will be some overlap between the current and amended versions of Rule 18 for some period of time. Given that inevitability, the Committee decided that an earlier implementation date should be used.

3. A diversion program should be established and a new rule codified in the Rules on Lawyers Professional Responsibility to govern program requirements.

Introduction.

The ABA's recommendation to establish a diversion program to address isolated incidents of non-serious misconduct, which the court adopted, was unanimously supported in the public comment process that followed the ABA's report. Among other benefits, a diversion program can educate and guide a lawyer, thus focusing the lawyer's attention on correcting non-serious instances of misconduct, rather than penalizing the lawyer by imposing a discipline sanction. *See* N.D. Rules for Law. Discipline, pt. VI, R. 6.6(B) (stating the purpose of diversion "is to protect the public by improving the professional competence of and providing educational, remedial, and rehabilitative programs" to lawyers). A diversion program would also better align with the Court's stated goal for discipline: to protect the public by improving professional competency without penalizing a lawyer, yet also deterring future misconduct. *See In re Montez*, 812 N.W.2d 58, 68 (Minn. 2012).

The diversion subcommittee, led by committee member Jon Tynjala,[20] began by looking at diversion programs around the country to understand how best to frame a program that is rehabilitative and preventive, rather than punitive. Next, the subcommittee identified the big-picture issues that should be part of a diversion program: a broad sweep of eligibility for diversion, with discretion placed with the Director to ensure that diversion (or discipline) works for the particular case; the mandatory terms for a diversion agreement, including what the lawyer must admit; recordkeeping that will allow for evaluation of the program's success, while also maintaining an appropriate measure of confidentiality; and, the appropriate level of notice to the complainant about the diversion disposition.

Notwithstanding the successful diversion programs across the country, and the availability of an ABA model rule, the Committee found each of these issues to be challenging, raising other, related sub-issues that required further consideration and deliberations. Ultimately, the Committee's goal was to recommend language that would establish a flexible, but robust, diversion program based on the principle that diversion is an alternative to discipline, not an alternative ***form***

[20] Committee members Ben Butler, Jason Butts, Eric Cooperstein, and Anna Hall also served on this subcommittee (Sarah Novak as staff attorney).

of discipline. The Committee also recommends the diversion program be implemented and the adopted rule reviewed after a period of 2 years. This initial period of operation should be sufficient to allow, at the 2-year mark, consideration of whether additional rule language is needed, whether the existing language should be clarified, and whether unanticipated issues in implementation or operation need to be addressed.

Specific Recommendations.

RULE 31. DIVERSION[21]

(a) Purpose. Diversion is not a form of discipline. The purpose of diversion is to protect the public by improving the professional competency of attorneys through educational, remedial, and rehabilitative programs so that attorneys modify practices, procedures, or other conduct that does not comply with the Minnesota Rules of Professional Conduct. Diversion is intended as an alternative to a disciplinary sanction. Diversion is designed to primarily address isolated, non-serious, or less harmful misconduct where a lawyer may benefit from guidance to improve the lawyer's skills, knowledge of the Rules of Professional Conduct, or to manage a behavioral health issue, including a mental health or substance use issue.

(b) Eligibility.

(1) A lawyer is eligible to participate in a diversion program only if it is unlikely that the lawyer will harm the public during the program, the Director can adequately supervise the terms of diversion, and the lawyer's participation in the program is likely to benefit the lawyer and serve the public interest.

(2) A matter generally should not be diverted under this section when:

(i) The typical level of discipline for the alleged misconduct is greater than public reprimand under Minnesota Supreme Court caselaw and past practices of the Office of Lawyers Professional Responsibility;

(ii) The conduct involves dishonesty, deceit, fraud, or intentional misrepresentation;

(iii) The conduct involves a felony conviction;

(iv) The conduct resulted in or is likely to result in a client's or another person's loss of money or property unless restitution is made a term of diversion;

(v) The lawyer has been publicly disciplined for any misconduct in the last five years;

(vi) The misconduct is of the same nature as misconduct for which the lawyer has been disciplined in the last five years.

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[21] The proposed diversion rule would be an entirely new rule, and thus, no redlining is used. The Committee recommends that this rule be codified as Rule 31 in the Rules on Lawyers Professional Responsibility.

(3) An admission of misconduct is not required as a condition of entry into or as a term of a diversion agreement; however, a lawyer may be required to admit facts related to the matter. Participation in a diversion agreement is voluntary.

(c) Diversion Agreement.

(1) Procedure.

(i) The Director, in their discretion, may offer the lawyer the opportunity to participate in a diversion agreement.

(ii) If the lawyer agrees, then the diversion agreement must be submitted to the Board Chair for approval. If the Chair rejects the agreement, then the investigation and disposition must proceed as otherwise provided in these rules.

(2) Contents.

(i) The terms of the diversion must be set forth in a written agreement between the lawyer and the Director. The agreement must specify the general purpose of the diversion, the facts that gave rise to the agreement, the terms and conditions of the diversion program, how compliance will be monitored, the length of the diversion period, required payment of costs, and any required payment of restitution.

(ii) Terms may include, but are not limited to, one or more of the following: mediation, fee arbitration, law office management assistance, continuing legal education courses, trust account education, ethics education, referral to a lawyer assistance program, assessment of and treatment for medical or behavioral health issues including mental health and substance use issues, verified attendance at abstinence recovery meetings, self-assessments, mentorship, and monitoring of the lawyer's practice or accounting procedures.

(iii) The Director must monitor the lawyer's compliance with the diversion agreement.

(3) Length. A diversion agreement may last no longer than 2 years, except the diversion agreement may be extended by one year with Board Chair approval.

(4) Notice. The Director must notify the complainant, if any, and the Chair of the District Committee that has investigated the complaint, if applicable, of a diversion agreement at the time of entry, and shall provide a copy of the diversion agreement to the complainant, if any, and District Committee, if applicable, provided that the copy of the diversion agreement provided to the complainant and District Committee, as applicable, shall be redacted to remove any private, sensitive, or personal health information, including, without limitation, any treatment, abstinence, or other mental health or substance use references, terms, conditions, or requirements.

(5) Appeal. Notwithstanding any other rule, a complainant cannot appeal a diversion agreement and cannot appeal a dismissal under Rule 8(d)(1) following successful completion of a diversion agreement.

(d) Effect of Diversion.

(1) Entry into a diversion agreement is not a finding of misconduct.

(2) When a diversion agreement is approved, the underlying disciplinary investigation is closed subject to reopening if the diversion agreement is not successfully completed. A lawyer participating in a diversion agreement is not under investigation and is not subject to a disciplinary proceeding while the agreement is in effect.

(3) Upon successful completion of a diversion agreement program, the Director must issue a determination that discipline is not warranted under Rule 8(d)(1).

(e) Material Breach of Diversion Agreement.

(1) If the Director believes that a lawyer had materially breached the diversion agreement, then the Director must notify the lawyer and give the lawyer an opportunity to respond in a reasonable amount of time.

(2) The Director then may decide that the agreement should remain in effect, offer to modify the diversion requirements, or terminate the diversion agreement, reopen the investigation, and proceed as otherwise provided by these rules.

(3) A breach of the diversion agreement is not a violation of the Rules of Professional Conduct but the conduct that caused the breach may be the basis for discipline.

(f) Confidentiality.

(1) Files and records relating to a matter in which diversion is entered may be disclosed only as permitted by Rule 20.

(2) The Director shall maintain statistics regarding the number, type, and terms of each diversion matter, including but not limited to whether diversion is successfully completed.

RULE 20. CONFIDENTIALITY; EXPUNCTION.

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

(1) Destruction Schedule. All records or other evidence of a dismissed complaint shall be destroyed three years after the dismissal<u>, except that records of diversion agreements will be destroyed 5 years after successful completion of the diversion agreement</u>;

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(f) Advisory Opinions, Overdraft Notification Program Files, Diversion Program Files, and Probation Files. The files, notes, and records maintained by the Director relating to advisory opinions, trust account overdraft notification, diversion programs, and monitoring of lawyers on probation shall be deemed confidential and shall not be disclosed except:

(1) in the course of disciplinary proceedings arising out of the facts or circumstances of the advisory opinion, overdraft notification, diversion program, or probation; or

(2) upon consent of the lawyer who requested the advisory opinion or was the subject of the overdraft notification, diversion program, or probation.

Discussion.

As noted earlier, the Committee's driving principle in developing the diversion rule was structuring a program to educate and rehabilitate. The recommended program and rule were developed after considering the following issues.

Eligibility. The ABA noted that a diversion program could eliminate the need for private probation and reduce the number of admonitions. ABA Rept. at 77, 81. These isolated instances of non-serious misconduct may reflect issues better suited for non-disciplinary treatment, such as office management, proper bookkeeping, or communication skills. *See id*. at 71–72.

The Committee aimed for an eligibility standard that is helpful and flexible. Thus, the proposed rule considers a lawyer eligible for diversion for misconduct that, currently, might result in private probation or an admonition. But the Committee does not recommend that diversion be limited *only* to such misconduct. Rather, eligibility should be determined by slightly broader principles: it must be in the public interest, the lawyer must not pose a risk to the public while diverted, and diversion should benefit the lawyer. These standards, the Committee believes, provide discretion to the Director to make diversion available in the appropriate case, even if the expected outcome (without diversion) may have been something other than private probation or an admonition. Thus, rather than eligibility standards that serve as a laundry list of conduct or misconduct that operates as per se disqualification for diversion, the list of disqualifying misconduct (paragraph (b)(2)) is framed in general terms. The Committee did not define "isolated, non-serious or less harmful misconduct," deciding that flexibility was a better approach as

compared to disqualifying language, and preferring the discretion vested in the Director with that flexibility to determine when diversion is appropriate based on the facts of the individual case.

Diversion Agreement. The Committee carefully considered the required terms of the diversion agreement, focusing specifically on whether a lawyer should be required to admit to violating any Rules of Professional Conduct. At its essence, diversion is not discipline. Diversion presents the opportunity to resolve a particular disciplinary matter with a carrot rather than a stick, with the prospect of avoiding future rule violations. Thus, the Committee concluded that facts that gave rise to the agreement can be admitted in the agreement, but there is no admission of misconduct.[22]

Other terms are summarized in paragraph (c)(1), including disclosure of how participation will be monitored, referrals to the programs or resources appropriate for the case (e.g., ethics training, health resources), and monetary terms (e.g., restitution, payment of costs). The Committee also recommends a 2-year limit to a diversion agreement, though the Board chair could approve a 1-year extension pursuant to the parties' agreement.

Notice to Complainant. The Committee discussed at length what notice should be provided to the complainant when a lawyer enters into a diversion agreement. The Committee agreed that the complainant and the District Ethics Committee (if any) that completed an investigation should receive a copy of the agreement, to enhance transparency and for consistency with the notice currently provided when a lawyer is placed on private probation or receives an admonition. However, this recommendation is based on the Committee's strong view that private or sensitive personal health information should be redacted from the agreement prior to disclosure. This conclusion recognizes that, consistent with the Office's existing practice in providing probation agreements to complainants, private personal information that would not otherwise be known to the complainant should not be disclosed. This information could include, without limitation, any terms, conditions, or requirements addressing treatment, abstinence, or other mental health or substance use references.

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[22] This approach is reflected in several of the public comments, which noted that a lawyer should acknowledge the facts, but not admit to misconduct. Exh. G, Question No. 2.

Recordkeeping. The Committee had numerous discussions regarding the appropriate retention period for diversion records. The Committee recognized that destroying all records upon successful completion of diversion might complicate the work of the Office when considering a subsequent diversion referral or when a complaint asserting similar misconduct is investigated. Records may also be needed to review the use of diversion and the success rate for diverted cases. On the other hand, the purpose of diversion is to provide an alternative to discipline and because this is *not* discipline, diversion history should not be part of the lawyer's record.

The Director does not support expungement. She questions whether the loss of a historical record of misconduct, through expungement of diversion records, will operate as a disincentive to using diversion. In other words, the Director might "lean toward discipline" as a means of retaining records on misconduct.[23]

Dismissed cases are currently expunged and destroyed three years after dismissal, Rule 20(e), RLPR, and the structure of diversion operates more like a dismissal than an alternative to discipline. Thus, initially, the Committee considered a 3-year retention period for diversion records. Exh. B, March 25, 2024 Comm. Mtg. Minutes. To address concerns that this might be too short a period of time, the Committee moved to a 5-year retention period, which effectively results in records retained for 6 to 7 years (assuming 1-2 years to complete the program after the lawyer is diverted).

The Director views a diverted case as, potentially, one that would otherwise be subject to a discipline sanction *absent* diversion. The Committee recognizes that a matter subject to a diversion agreement may not be considered dismissed before successful completion of the program. But retaining diversion records merely as a historical record to use if there is subsequent misconduct suggests that diversion is a disciplinary sanction, rather than an alternative to discipline.

There are credible competing interests on this point. To balance these interests, the Committee recommends that diversion records be kept for a period of five years *following* the successful completion of diversion, which should mitigate concerns about needed access to records

[23] To be clear, the Director does not want diversion records retained to use or disclose as prior discipline history, because diversion is not discipline. Rather, the Director asserts that diversion records are relevant in the case of subsequent misconduct to evaluate suitability for any disposition, whether an admonition, public charges, or diversion.

for a period of time. Seven or more years after completion of diversion, the need for access to diversion records is less compelling. Thus, the Committee's recommended expungement approach allows for a period of access but avoids retaining records for a non-discipline history permanently.

Remaining Considerations. The court decided that a diversion program should be established to better serve Minnesota's bar. Aug. 2023 Order at 28. In reaching this conclusion, the court also asked the Committee "to address the appropriation disposition of Rule 8(d)(3), RLPR," which governs private probation, and which the ABA recommended eliminating. *Id*. at 28, n.17.

The Committee is eager to see diversion made available to the Minnesota bar. Retaining private probation may undermine the intended shift toward diversion. But, as explained below, the diversion program authorized by the recommended rule will take time to fully implement and launch. While that work is underway, the Committee concluded that private probation should remain an available tool for discipline. The Committee also concluded that the more logical time to evaluate how, if at all, to sunset the use of private probation in favor of diversion is best addressed after the diversion program is operational for a period of time.

The effective date for a diversion program requires careful consideration. Because this will be primarily new programming, substantial work remains to be done. In addition to identifying the types of private probation that currently exist, the appropriate methods of diverting admonition-level conduct such as non-compliant fee agreements and failures to confirm conflict waivers in writing need to be identified. Then, the partners and resources needed to support a robust diversion effort must be identified and recruited, and programming must be developed. Further, these outside resources (outside of the Office and the court) will need to collaborate with the Office, the Board, the court, and (possibly) State Court Administration. And, while some programming options will be easily identified, such as education in the area of trust accounting; or may already be available, such as education (through CLEs) on office management techniques; other options may take longer to develop and launch. To put it plainly, the diversion option cannot be exercised if the program to which the person would be diverted does not exist. Thus, despite the strong interest in a diversion program, the Committee recommends that an effective date of at least 6 months after adoption be considered, to allow adequate time to develop a robust selection of diversion-program options.

Finally, the Committee believes that once established, a thorough evaluation after 2 years is needed to review rule language and metrics, address any unforeseen issues, revise rule language as needed, and ensure that a successful diversion program continues.[24] After a period of use and evaluation, the Committee believes that appropriate adjustments can be made to ensure that diversion fulfills its intended purposes: improving professional competency through educational, remedial, and rehabilitative programs that allow lawyers to modify practices, procedures, or other conduct that does not comply with the Minnesota Rules of Professional Conduct. The evaluation can also address the continued use or discontinuance of private probation. Thus, the Committee recommends that the court require an evaluation, with a report and recommendations, that is due (filed with the court) approximately 2 years after the effective date.

[24] The Committee did not designate this initial period of operation as a "pilot" program. A pilot program suggests the possibility of future discontinuance. Given the unanimous support for a diversion program, the better approach is to establish the program and then adjust as needed after an initial period of operation.

4. Rules 4 and 5, RLPR, should be amended to codify existing practices at the Board and changes the Board has implemented to its structure or responsibilities.

Introduction.

The ABA recommended changes to the structure and responsibilities of the Board, some of which this Court adopted. Specifically, the Court agreed that the size of the Board's Executive Committee could be reduced, and certain of the Board's oversight responsibilities, with respect to the Director, should be eliminated. Aug. 2023 Order at 3–6. The Board had already implemented some of these changes, *see id*. at 5, n.3, and thus petitioned to amend Rules 4–5, RLPR, to codify these changes. The Board's petition also included proposed amendments to those rules to reflect existing practices in its operations. Board 2023 Pet'n at 3–4.

Specific Recommendations.

RULE 4. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

(a) Composition. The Board shall consist of:

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(2) Thirteen lawyers having their principal office in this state, one~~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 may be used where necessary to assure that as nearly as may be one-third of all terms expire each February 1.

* * *

(c) Duties. The Board is responsible for administering these rules, and for establishing the policies that govern the lawyer discipline system and disability system~~, and for providing recommendations and guidance to the Director regarding the operations of the Office of Lawyers Professional Responsibility~~. The Board 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~~ Chair may ~~elect~~ appoint 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~~ one lawyer~~s~~ and ~~two~~ one nonlawyer~~s~~ designated annually by the Chair, shall be responsible for carrying out the duties set forth in these Rules. The Executive Committee shall act on behalf of the Board between Board meetings. ~~If requested by the~~ 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~~ Rule 2.11 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~~ Chair shall assign matters to Panels ~~in rotation~~ randomly. 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.

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RULE 5. DIRECTOR

(a) Appointment. The Director is an employee of the Judicial Branch, appointed by and serving at the pleasure of this Court. The State Court Administrator will evaluate the Director's performance~~, with input from the Board,~~ annually or at such other times as this Court directs. ~~Every 2 years the State Court Administrator and the Board shall make recommendations to this Court concerning the continuing service of the Director.~~

(b) Duties. The Director is responsible for the day-to-day operations of the Office of Lawyers Professional Responsibility, shall supervise the employees of that Office, shall prepare and submit to the ~~Board~~ Court 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~~ Court that it may require the Director to provide.

(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~~ Court 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.~~

Discussion.

The Committee reviewed these proposed amendments, which are largely technical and for the most part, reflect existing practices, at its October, November, and December meetings.[25] These amendments were unanimously supported in the Committee's deliberations. The proposed amendments also capture the amendments proposed by the Board in its 2023 petition.

Notably, some amendments are effectively operational now. For example, the Board has already reduced the size of the Executive Committee to 3 members, and the court has already eliminated the 2-year review of the Director's appointment. Aug. 2023 Order at 5–6 & n.3. Thus, the Committee believes the amendments to Rules 4 and 5 can be made effective upon adoption.

[25] The amendment to Rule 5(b), RLPR, changes the Director's annual report requirement from one submitted to the Board, to one submitted to the court. Thus, between Rules 4 and 5, two annual reports will be submitted to the court, although the Board and the Director could choose to collaborate on a joint report.

5. Rules 6, 7, and 8, RLPR, should be amended to promote transparency and efficiency in the investigation process.

Introduction.

Investigations of a complaint of alleged professional misconduct are authorized in Rule 7, RLPR, by a District Ethics Committee; and in Rule 8, RLPR, which governs the Director's investigation. *See* Rule 6(a), RLPR ("All investigations of lawyers' alleged unprofessional conduct or allegations of disability shall be investigated pursuant to these Rules."). The District Ethics Committee's investigation leads to a report and recommendation, Rule 7(b), RLPR, and must be "completed and . . . made promptly." *Id*. (requiring a report to made "within 90 days" absent "good cause"). The Director is required to "keep the complainant advised of the progress of the proceedings" before the District Ethics Committee. Rule 7(d), RLPR.

"[W]ith or without a complaint or a" report and recommendation from a District Ethics Committee, the Director "may make such investigation" as is appropriate if there is "a reasonable belief that professional misconduct may have occurred." Rule 8(a), RLPR. This rule also requires "prior approval of the [Board's] Executive Committee" before the Director begins an investigation on her "sole initiative." *Id*. Unlike the 90-day deadline in Rule 7 for the District Ethics Committee's investigation and the direction in that rule to "keep the complainant advised of the progress of the proceedings," Rule 8 does not have an explicit deadline for the investigation or a status update provision.

Finally, although the rules that govern an investigation contemplate receiving a response from the lawyer who is the subject of the complaint, neither Rule 7 nor Rule 8 explicitly provide for that response. *Cf*. Rule 6(d), RLPR (requiring the District Ethics Committee and the Director to "afford the complainant an opportunity to reply to the lawyer's response to the complaint").

The court's order announced two changes to these rules for which it requested the Committee's input. First, the court agreed with the ABA that the requirement for Board approval of Director-initiated investigations should be eliminated. Aug. 2023 Order at 6–7. Second, noting that "deadlines in the rules governing the investigation of a complaint are useful," *id*. at 8 (stating that the rules do not provide response periods for the lawyer or the complainant), the court asked the Committee to "recommend amendments to the rules that will establish response deadlines and promote transparency on the status of an investigation." *Id*. at 8–9.

Specific Recommendations.

RULE 6. COMPLAINTS

(a) Investigation. All complaints of lawyers' alleged unprofessional conduct or allegations of disability that are investigated 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~~ Rule 2.11 of the Code of Judicial Conduct. No employee of the ~~office~~ 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~~ Rule 2.11 of the Code of Judicial Conduct.

***

(d) ~~Opportunity~~ Time to ~~r~~Respond ~~to statements~~. The District Committee or the Director's Office shall afford the respondent an opportunity to respond to the complaint, and the complainant an opportunity to reply to the lawyer's response to the complaint. Any such response or reply must be provided to the District Committee or the Director within 14 days after the date of a written notice that requests a response or reply, unless an extension is granted in writing by the District Committee Investigator or the Director. If the notice and request for a response or reply is sent to the respondent or the complainant by United States Mail, 3 days shall be added to the response period.

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. Any response to a request for information or a reply to a response must be provided within the time established by Rule 6(d) of these Rules.

* * *

(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~~ 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. The Director shall notify the respondent of the District Committee's recommendation within 14 days of receipt of the Committee's report and recommendation.

* * *

RULE 8. DIRECTOR'S INVESTIGATION

(a) ~~Initiating~~ Investigation.

(1) 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~~.

(2) Any response to a request for information or a reply to a response must be provided within the time established by Rule 6(d) of these Rules.

(3) The Director must complete the investigation and issue a disposition under Rule 8(d) promptly and, in any event, within 270 days ("the deadline") after the Director's decision to investigate. Delays caused by a respondent's non-cooperation shall not be counted toward the 270-day period.

(4) The Director may seek from the Board Chair an extension of time to continue the investigation. Any such request must be made before the deadline. The Board Chair may grant the request only if the Chair determines that good cause to do so exists. The following non-exclusive reasons may constitute good cause: the complexity of the investigation, the existence of multiple pending investigations involving the same respondent, a respondent's failure to cooperate with the investigation, or the need to wait for other related, pending matters in civil or criminal court.

(5) If the Board Chair finds that good cause exists, then the Chair may extend the deadline by up to 90 days. If the Board Chair does not find good cause, then the Director must, within 30 days of the Board Chair's determination, issue a disposition as provided in Rule 8(d).

(6) The Director may subsequently seek additional good-cause-based extensions of up to 90 days each. If the Board Chair does not find good cause for any subsequent extension, then the Director must, within 30 days of the Board Chair's determination, issue a disposition as provided in Rule 8(d).

(7) If the Director fails to comply with the provisions of Rule 8(a)(3) – 8(a)(6), then the Director must issue a disposition under Rule 8(d)(1). Notwithstanding any other rule, the complainant may not appeal such a disposition.

(8) The Director must transmit notice of the Board Chair's decision on any extension requests to the complainant and the respondent within seven days of receiving the decision.

(b) Complaints ~~by Criminal Defendants~~ Against Court-Appointed Counsel. 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. * * *

* * *

(d) Disposition.

* * *

(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.

(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~~fourteen~~ days. The Director shall notify the ~~lawyer~~ Chair of the appeal and the Chair shall assign the matter by rotation to a ~~board~~ member of the Board, 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~~

(3~~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.

* * *

Discussion.

The proposed amendments to Rules 6, 7, and 8 range from technical, non-substantive, and unanimously supported changes, to substantive changes in the way in which investigations are completed. For example, the amendments to Rule 6(a) and Rule 8(b), are purely technical and made for consistency with other amendments or for internal consistency with the language of the paragraph. Like the recommended change to Rule 4(e), RLPR, to use the correct citation for the Code of Judicial Conduct, *supra* at 48, the proposed amendment to Rule 6(a), RLPR, now shows the same, correct, citation. And, given the text of Rule 8(b), RLPR, which discusses complaints "by or on behalf of a party represented by court-appointed counsel," the proposed amendment to the title of this paragraph now refers to "complaints against court-appointed counsel."

Substantive amendments are proposed to Rule 6(d), Rule 7(a), (c), and Rule 8(a), (e), which are each reviewed separately here.

Rule 6(d) is revised to address the court's direction to "establish response deadlines" in the investigation rules. The current provision is silent on the opportunity for or timing of the lawyer's response to a complaint. However, paragraph (d) allows the complainant to "reply to the lawyer's response to the complaint," thus *implying* that the lawyer has responded to the complaint. As proposed for amendment, the rule now explicitly allows the lawyer to respond to the complaint and establishes deadlines for that response and the complainant's reply. Amendments are then proposed to Rule 7(a) and Rule 8(a)(2), to incorporate the deadlines from the amended version of Rule 6(d). This change, the Committee concluded, will provide clarity and guidance to complainants, respondents, and the investigating District Ethics Committee.

Rule 7(c) is amended to require the Director to notify the respondent lawyer of the District Ethics Committee's completion of its work within 14 days after receipt of that report and recommendation. The Committee recognizes that receipt of the District Committee's report and recommendation is not the final outcome of a complaint investigated by that committee. The Director must review that recommendation, conducting a de novo review when dismissal is recommended, *see* Aug. 2023 Order at 29–30, and decide on the appropriate disposition, *see* Rule 8(d), RLPR (setting out the disposition possibilities). It is unlikely that this review will be completed within 14 days after the Director receives the District Ethics Committee's report and recommendation, but the Committee concluded that transparency in the process favors providing

notice to the lawyer that at least one step—the District Committee's investigation and recommendation—has been completed.

Rule 8(a), (e) are each amended for consistency with the court's directions: to eliminate the current requirement for Board approval of a Director-initiated investigation, and to eliminate the authority of a single Board member to require the Director to issue an admonition. *See* Aug. 2023 Order at 6–7, 26.

Rule 8(a) is further revised to adopt a deadline for the Director's investigation. In its August 2023 Order, the court considered "Office practices that may benefit from changes to enhance efficiency and transparency." Aug. 2023 Order at 7. The court concluded that "deadlines in the rules governing the investigation of a complaint are useful," and asked the Committee to "recommend amendments to the rules that will establish response deadlines and promote transparency on the status of an investigation." *Id*. at 8.[26]

The Committee took substantial care in reviewing the need for a deadline on the Director's investigation. A handful of states have specific deadlines for complaint investigation,[27] and using those as a guide, the Committee concluded that a specific deadline would promote transparency and fairness, while encouraging efficiency and an appropriate allocation of resources. The obvious goal with a specific deadline is to provide some measure of certainty to complainants and respondents, namely that a disposition of the complaint will be made within a defined period of

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[26] The court noted that case processing standards could be implemented "for fairness, to promote public trust and confidence, and to provide a periodic review of the efficiency of the system," and referred the ABA's recommendation to adopt such standards to the Director, "to work with State Court Administration on gathering the information needed to develop and make recommendations on" those standards. *Id*. at 34.

[27] Conn. R. Super. Ct. Gen. Rules, ch. 2, R. 2-32(i) (requiring a panel to dispose of a complaint within 110 days after the referral date); Md. R., tit. 19, ch. 700, R. 19-711(d)(1) (requiring Bar Counsel to complete an investigation within 120 days after a complaint is docketed, unless good cause for an extension exists); Ohio Sup. Ct. Rules Governing Bar Proc., R. 5, § 9(D) (requiring an investigation to be "concluded" within 270 days after receipt of a grievance, and the grievance disposed of within 30 days after the investigation is complete). Mississippi requires an "expeditiously conducted" investigation so that complainants are not "deprived of [the] right to a timely, fair and proper investigation of a complaint," and the lawyer is not "subjected to unfair and unjust charges." Miss. Rules of Discipline for Miss. St. Bar, R. 5. *See also* Rule 7(c), RLPR (requiring District Ethics Committees to complete investigations and make a report and recommendation within 90 days, absent good cause).

time. On the other hand, the Committee recognized that variables outside the Director's control may impact that deadline, i.e., the level of cooperation, pending matters in civil or criminal courts, and the complexity of the alleged misconduct. Thus, the Committee concluded that extension authority was needed. The Committee recommends vesting that authority in the Board Chair, who, other than the Director, is most familiar with the investigation process and the resource issues in the Director's office.[28] And although the Board has stated its preference for remaining administratively separate from the Office, *see* Board Cmt. at 2, Nos. ADM10-8042, 10-8043 (filed Feb. 1, 2023), the Board Chair holds similar authority in analogous settings, such as approving subpoena requests, Rule 8(c), RLPR and private probation agreements, Rule 8(d)(3)(i), RLPR. Finally, the Committee concluded that automatic dismissal of the complaint due to the length of an investigation should be a rare consequence, reserved for a Director's failure to abide by the provisions that allow for extensions of time to complete the investigation.

The Committee acknowledges that there are competing considerations surrounding this issue. To some extent, the timely completion of investigations depends on the available resources in the Office. Further, the Office has other, important, responsibilities apart from investigations and prosecuting public discipline cases that demand time and resources, including the well-established advisory opinion service, monitoring private probation, Rule 8(d)(3), RLPR, and serving as trustee, Rule 27, RLPR. On the other hand, an open-ended status for investigations, with no guidance for the investigator on a deadline lacks transparency. The lack of any deadline also imposes uncertainty and stress on the lawyer and the complainant. The lawyer remains under investigation and a complaint remains pending for an undefined period of time, forcing the lawyer to report that status ("under investigation") to other licensing authorities, insurance carriers, or employers. Further, complainants may question the fairness and credibility of a system that operates without deadlines. Ultimately, the Committee concluded that the system should change in order to attempt a better balance of these considerations.

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[28] The Committee considered placing the extension authority with the State Court Administrator, who has more of a supervisory (HR) role with respect to the Director; or, with the Supreme Court, which has the ultimate authority in disciplinary matters. The State Court Administrator, though perhaps as familiar as the Board chair with the personnel issues that may impact deadlines, is less familiar with the investigative process. The Supreme Court seems less advisable, because it typically does not know the identity of lawyers under investigation before the public charging stage. Thus, with no perfectly ideal option, the Committee decided that placing the extension authority with the Board Chair is the best option out of the three available.

The proposed amendment to Rule 8(a) thus establishes a 270-day (9 months) deadline for an investigation; authorizes the Board chair to grant extensions of up to 90 days upon a showing of good cause; excludes the lawyer's non-cooperation from the 270-day period; identifies a non-exclusive list of variables that may delay an investigation and will establish good cause for an extension; and allows for dismissal of the complaint only if the Director fails to obtain an extension to complete the investigation.

Remaining Considerations. The Board's proposed amendments to Rules 6, 7, and 8 have been included with the Committee's proposed amendments to these rules, with one exception. The Board's petition to amend Rule 8(e), to allow the Panel chair rather than the Board chair to approve stipulated probation agreements, was discussed by the Committee, but was not moved forward, was therefore not voted upon, and is not recommended here.

The remaining issue with the proposed amendments to these Rules is the appropriate effective date. If the court adopts these amendments, the Committee recommends a short period of time after the date of that decision—90 days—to allow the Director and the District Ethics Committees to adjust internal practices and procedures to accommodate the new deadlines, specifically, the new response deadlines, Rules 6(d), 7(a), RLPR, the required notice to the respondent lawyer, Rule 7(c), RLPR, and the deadline for completion of the Director's investigation, Rule 8(a), RLPR. Further, the rules as amended should be applied to complaints filed, or investigations commenced, on or after the effective date. While this timing will result in pending complaints or investigations proceeding without following the new deadlines, the Committee believes the Director and District Ethics Committees can consider adopting one or more of those deadlines earlier, if feasible and appropriate in the circumstances of a particular case. For example, the Director may be able to abide by the 14-day notice provision regarding the report and recommendation from a District Ethics Committee before that amendment is effective; a District Ethics Committee may be able impose a 14-day deadline for a lawyer's response to a complaint before the amended rule is effective.

6. Rule 28, RLPR, should be amended to update the language and clarify the procedures for transfers to disability status.

Introduction.

The ABA recommended updating the terminology in Rule 28, RLPR, which governs transfers to disability status and asserting a disability in disciplinary proceedings and clarifying the confidential nature of these proceedings with rule amendments. ABA Rept. at 68. In its comment, the Office also proposed streamlining the process in Rule 28 when a medical opinion supports transferring a lawyer from active status to disability inactive status. OLPR Cmt. at 43, Nos. A10-8042, 10-8043 (filed Feb. 1, 2023). The Court adopted the ABA's recommendation and asked the Committee to consider the points raised by the Office and the confidentiality issues that are implicated when a lawyer's mental, physical, or general health is at issue. Aug. 2023 Order at 31.

The Committee looked to the ABA Model Rule and Colorado's rule on disability proceedings, Colo. R. Civ. P. ch. 20, R. 243, to establish a definition and standard for these proceedings.[29] The Committee then considered the paths that may lead to a transfer to disability status rather than discipline; the scope of privilege waivers in these proceedings and the possible use of adverse inferences; confidentiality; the dispositions available to the court; and reinstatement from disability status.

Specific Recommendations.

RULE 28. LAWYER DISABILITY PROCEEDINGS ~~DISABILITY STATUS~~[30]

(a) Scope of Rule and Standard for Transfer to Disability Inactive Status. Lawyers may voluntarily select inactive or permanent disability status through the Minnesota Lawyer Registration Office according to the Rules of the Supreme Court on Lawyer Registration. For the purposes of this rule, the Director may proceed under this rule when a lawyer's disability raises public protection issues. A lawyer who has been judicially declared incompetent, is subject to a current order of commitment, is under guardianship, or whose physical, mental, or cognitive condition, including substance misuse, ~~mental illness, mental deficiency, senility, or habitual and excessive use of intoxicating liquors, narcotics, or other drugs~~ prevents the lawyer from fulfilling

[29] The Committee also sought comments from the Disability Law Association on Rule 28.

[30] A clean version of this Rule is found at page 62 of this Report.

their professional obligations or defending a discipline proceeding ~~competently representing clients~~ is disabled, and may be involuntarily or by stipulation ~~shall be~~ transferred to disability inactive status under this rule.

(b) Effect. While a lawyer is on disability inactive status, the lawyer is prohibited from practicing law.

(c) Procedures for Transfers to Disability Inactive Status.

(1) Petition Premised on Order of Commitment, Guardianship, or Judicial Declaration of Incompetence. On learning that a lawyer is subject to a current order of commitment, is under guardianship, or has been judicially declared incompetent, and the lawyer continues to practice, the Director may file with the Court a petition seeking the lawyer's transfer to disability inactive status, accompanied by proof of the basis for the petition. On receiving a properly supported petition, the Court shall immediately transfer the lawyer to disability inactive status. The Director must provide notice of the transfer to the lawyer or, where applicable, to the lawyer's guardian or the director of the facility to which the lawyer has been committed.

(2) Petition Premised on Reciprocal Disability.

(i) Duty to Notify. A lawyer who is transferred to disability inactive status in another jurisdiction must notify the Director of the transfer within 30 days of the order transferring the lawyer to disability inactive status.

(ii) Petition. Upon learning from any source that a lawyer has been transferred to disability inactive status in another jurisdiction, the Director may file a petition for the lawyer's transfer to disability inactive status, along with a copy of the order of the other jurisdiction. The Director must serve the lawyer with the petition and must file an affidavit of service. Personal service is not required.

(iii) Order to Show Cause. A final adjudication in another jurisdiction that a lawyer, whether admitted to that jurisdiction or not, has been transferred to disability inactive status conclusively establishes the disability for purposes of this rule. The Court shall issue an order to show cause as to why the reciprocal transfer to disability inactive status should not be ordered. The Court shall transfer a lawyer to disability inactive status after notice unless the procedures in the other jurisdiction were unfair such that the lawyer did not have notice of the intent to transfer to disability inactive status and the opportunity to present evidence of the absence of a disability. The Court may order such proceedings as it deems necessary to determine the fairness of the other jurisdiction's proceedings.

(3) Petition Initiated by the Director Without Court Order.

(i) Petition. If the Director reasonably believes that a lawyer is disabled under paragraph (a) of this rule, and that the lawyer's continued practice of law presents a risk to the public, the Director may, with the approval of the Board Chair, file a petition setting forth the basis for the Director's reasonable belief. The Director must serve the lawyer with the petition and must file an affidavit of service. Personal service is not required.

(ii) Answer. Within 20 days after service of the petition, the respondent lawyer shall file an answer to the petition in this Court, with proof of service on the Director. The

answer shall set forth the reasons why the lawyer believes that transfer to disability inactive status is not warranted.

(iii) Referee proceedings. If the lawyer contests the transfer to disability inactive status, the Court shall appoint a referee with directions to make findings, conclusions and a recommendation regarding whether there is clear and convincing evidence exists to warrant transfer of the lawyer to disability inactive status. The referee may, in their discretion, hold a hearing and order the lawyer to submit to an independent medical examination or evaluation by a designated professional at the respondent lawyer's cost unless the lawyer is unable to pay for such examination, in which case the Director shall bear such cost. The referee may appoint counsel to represent the lawyer if the lawyer requests appointment of counsel and the lawyer is financially eligible for appointment of counsel.

(iv) Financial eligibility shall be determined by the referee in the same manner as eligibility for appointment of a public defender in a criminal case. The referee's findings, conclusions and recommendation may be challenged by following the process set forth in Rule 14.

(v) Adverse Inference. A lawyer may refuse to testify or produce records to the extent consistent with the lawyer's constitutional privilege against self-incrimination. The referee and the court may draw an adverse inference from a lawyer's decision not to testify, produce records, or comply with any order issued in a disability proceeding for reasons other than a valid invocation of the lawyer's constitutional right against self-incrimination.

(4) Asserting Disability in Disciplinary Proceedings. A lawyer~~'s assertion of~~ may assert a disability in defense or mitigation in a disciplinary proceeding or investigation, or a revocation of conditional admission proceeding or investigation. Such assertion shall be deemed a waiver of any applicable patient-treating professional ~~the doctor-patient~~ privilege as it relates to the condition that is asserted as the basis of the disability or mitigation alleged. Where a referee has been appointed, t~~T~~he referee may order an examination or evaluation by such persons ~~or institution~~ as the referee designates. If a lawyer asserts a ~~alleges~~ disability ~~during a disciplinary investigation or proceeding or a revocation of conditional admission proceeding~~ and ~~therefore~~ is unable to assist in the defense of an investigation or proceeding, the Director shall inform the Court ~~of the allegation~~ and of the Director's position regarding the allegation. The Court may:

(i~~1~~) Transfer the lawyer to disability inactive status;

(ii~~2~~) Order the lawyer to submit to a medical examination by a designated professional;

(iii~~3~~) Appoint counsel if the lawyer has not retained counsel and the lawyer is financially eligible for appointed counsel. Financial eligibility shall be determined by the referee appointed by the Court to hear the disciplinary or disability petition in the same manner as eligibility for appointment of a public defender in a criminal case;

(iv~~4~~) Stay disciplinary proceedings or revocation of conditional admission proceedings until it appears the lawyer can assist in the defense;

(v~~5~~) Direct the Director to file a petition under Rule 12;

(vi~~6~~) Appoint a referee with directions to make findings and recommendations to the Court regarding the disability allegation or to proceed under Rule 14;

(vii~~7~~) Make such or further orders as the Court deems appropriate.

~~**(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.~~

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

~~(1)~~ S~~s~~hall be deemed a waiver of any applicable patient-treating professional ~~the doctor-patient~~ privilege as it relates to ~~regarding~~ the specific incapacity or disability.~~; 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) Confidentiality. The provisions of Rule 20 govern the confidentiality of records in proceedings where a lawyer's disability is at issue. The lawyer and the Director shall work together to designate medical records as confidential, and the Director shall seek such court orders as are necessary to protect against disclosure of the designated medical records of a lawyer.

~~**(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.~~

[*Rule 28, clean version, with recommended amendments adopted*]

RULE 28. LAWYER DISABILITY PROCEEDINGS

(a) Scope of Rule and Standard for Transfer to Disability Inactive Status. Lawyers may voluntarily select inactive or permanent disability status through the Minnesota Lawyer Registration Office according to the Rules of the Supreme Court on Lawyer Registration. For the purposes of this rule, the Director may proceed under this rule when a lawyer's disability raises public protection issues. A lawyer who has been judicially declared incompetent, is subject to a current order of commitment, is under guardianship, or whose physical, mental, or cognitive condition, including substance misuse, prevents the lawyer from fulfilling their professional obligations or defending a discipline proceeding is disabled, and may be involuntarily or by stipulation transferred to disability inactive status under this rule.

(**b) Effect.** While a lawyer is on disability inactive status, the lawyer is prohibited from practicing law.

(c) Procedures for Transfers to Disability Inactive Status.

(1) Petition Premised on Order of Commitment, Guardianship, or Judicial Declaration of Incompetence. On learning that a lawyer is subject to a current order of commitment, is under guardianship, or has been judicially declared incompetent, and the lawyer continues to practice, the Director may file with the Court a petition seeking the lawyer's transfer to disability inactive status, accompanied by proof of the basis for the petition. On receiving a properly supported petition, the Court shall immediately transfer the lawyer to disability inactive status. The Director must provide notice of the transfer to the lawyer or, where applicable, to the lawyer's guardian or the director of the facility to which the lawyer has been committed.

(2) Petition Premised on Reciprocal Disability.

(i) Duty to Notify. A lawyer who is transferred to disability inactive status in another jurisdiction must notify the Director of the transfer within 30 days of the order transferring the lawyer to disability inactive status.

(ii) Petition. Upon learning from any source that a lawyer has been transferred to disability inactive status in another jurisdiction, the Director may file a petition for the lawyer's transfer to disability inactive status, along with a copy of the order of the other jurisdiction. The Director must serve the lawyer with the petition and must file an affidavit of service. Personal service is not required.

(iii) Order to Show Cause. A final adjudication in another jurisdiction that a lawyer, whether admitted to that jurisdiction or not, has been transferred to disability inactive status conclusively establishes the disability for purposes of this rule. The Court shall issue an order to show cause as to why the reciprocal transfer to disability inactive status should not be ordered. The Court shall transfer a lawyer to disability inactive status after notice unless the procedures in the other jurisdiction were unfair such that the lawyer did not have notice of the intent to transfer to disability inactive status and the opportunity to present evidence of the absence of a disability. The Court may order such proceedings as it deems necessary to determine the fairness of the other jurisdiction's proceedings.

(3) Petition Initiated by the Director Without Court Order.

(i) Petition. If the Director reasonably believes that a lawyer is disabled under paragraph (a) of this rule, and that the lawyer's continued practice of law presents a risk to the public, the Director may, with the approval of the Board Chair, file a petition setting forth the basis for the Director's reasonable belief. The Director must serve the lawyer with the petition and must file an affidavit of service. Personal service is not required.

(ii) Answer. Within 20 days after service of the petition, the respondent lawyer shall file an answer to the petition in this Court, with proof of service on the Director. The answer shall set forth the reasons why the lawyer believes that transfer to disability inactive status is not warranted.

(iii) Referee proceedings. If the lawyer contests the transfer to disability inactive status, the Court shall appoint a referee with directions to make findings, conclusions and a recommendation regarding whether there is clear and convincing evidence exists to warrant transfer of the lawyer to disability inactive status. The referee may, in their discretion, hold a hearing and order the lawyer to submit to an independent medical examination or evaluation by a designated professional at the respondent lawyer's cost unless the lawyer is unable to pay for such examination, in which case the Director shall bear such cost. The referee may appoint counsel to represent the lawyer if the lawyer requests appointment of counsel and the lawyer is financially eligible for appointment of counsel.

(iv) Financial eligibility shall be determined by the referee in the same manner as eligibility for appointment of a public defender in a criminal case. The referee's findings, conclusions and recommendation may be challenged by following the process set forth in Rule 14.

(v) Adverse Inference. A lawyer may refuse to testify or produce records to the extent consistent with the lawyer's constitutional privilege against self-incrimination. The referee and the court may draw an adverse inference from a lawyer's decision not to testify, produce records, or comply with any order issued in a disability proceeding for reasons other than a valid invocation of the lawyer's constitutional right against self-incrimination.

(4) Asserting Disability in Disciplinary Proceedings. A lawyer may assert a disability in defense or mitigation in a disciplinary proceeding or investigation, or a revocation of conditional admission proceeding or investigation. Such assertion shall be deemed a waiver of any applicable patient-treating professional privilege as it relates to the condition that is asserted as the basis of the disability or mitigation alleged. Where a referee has been appointed, the referee may order an examination or evaluation by such person as the referee designates. If a lawyer asserts a disability and is unable to assist in the defense of an investigation or proceeding, the Director shall inform the Court and of the Director's position regarding the allegation. The Court may:

(i) Transfer the lawyer to disability inactive status;

(ii) Order the lawyer to submit to a medical examination by a designated professional;

(iii) Appoint counsel if the lawyer has not retained counsel and the lawyer is financially eligible for appointed counsel. Financial eligibility shall be determined by the

referee appointed by the Court to hear the disciplinary or disability petition in the same manner as eligibility for appointment of a public defender in a criminal case;

(iv) Stay disciplinary proceedings or revocation of conditional admission proceedings until it appears the lawyer can assist in the defense;

(v) Direct the Director to file a petition under Rule 12;

(vi) Appoint a referee with directions to make findings and recommendations to the Court regarding the disability allegation or to proceed under Rule 14;

(vii) Make such or further orders as the Court deems appropriate.

(d) Reinstatement. This Court may reinstate a lawyer to active status from disability inactive status upon a showing that the lawyer is fit to resume the practice of law. The parties shall proceed by petition as provided in Rule 18. The lawyer's petition for reinstatement shall be deemed a waiver of any applicable patient-treating professional privilege as it relates to the specific incapacity or disability.

(e) Confidentiality. The provisions of Rule 20 govern the confidentiality of records in proceedings where a lawyer's disability is at issue. The lawyer and the Director shall work together to designate medical records as confidential, and the Director shall seek such court orders as are necessary to protect against disclosure of the designated medical records of a lawyer.

Discussion.

Summary. The Committee began the work of updating Rule 28 with terminology, re-titling the rule as "Lawyer Disability Proceedings," rather than simply "Disability Status." Other terminology changes include using competency terms ("incompetent"), referring to "capacity" rather than "deficiency," and using "substance misuse" rather than the more ambiguous "excessive use."

Paragraph (a) establishes a standard for disability proceedings brought under Rule 28: when the lawyer's disability raises public protection issues and the disability prevents the lawyer from fulfilling professional obligations or defending a discipline proceeding. This language establishes a narrow standard for the Director's action. Thus, if a lawyer has a disability but is not practicing, that lawyer may not present a risk to the public, which may mean that action under Rule 28 is not warranted. Paragraph (a) also draws a line between voluntary disability status, secured through the Lawyer Registration Office, and disability status by stipulation or through involuntary proceedings under Rule 28, which requires the Director's involvement. Paragraph (b) provides a clear statement on the effect of disability status: the lawyer is prohibited from practicing law.

Paragraph (c) organizes the procedures for the different paths to disability status: non-disciplinary proceedings in Minnesota that warrant a transfer to that status (guardianship, conservatorship), proceedings in other jurisdictions (reciprocal actions), or proceedings initiated by the Director. As different paths require different procedures, each subparagraph identifies the information needed from the Director and/or the lawyer, and the disposition options available to the court. Subparagraph (4) explains the scope of the privilege waiver that results from asserting a disability in a discipline proceeding: the patient-treating professional privilege is waived "as it relates to the disability or mitigation alleged." In particular, the Committee expanded the applicable privilege beyond the doctor-patient privilege by using "patient-treating professional" to more broadly capture privileges available to many different licensed treating professionals,[31] and simultaneously narrowed the required waiver to those records that relate to the alleged disability.

Finally, paragraph (d) invokes Rule 18 for reinstatement from disability status to active status, and paragraph (e) addresses the confidentiality of the lawyer's medical records.

Remaining Considerations. The remaining consideration is the effective date for the proposed amendments to Rule 28. While much of the language is new, the recommended amendments state standards and explain procedures that reflect existing approaches and practices. Thus, the Committee recommends that the amendments to Rule 28 be made effective immediately upon adoption. Further, the Committee believes Rule 28 as amended can be applied to cases pending on, or filed on or after, the effective date. This application is feasible, in the Committee's view, because the universe of cases that will proceed under Rule 28 as amended is relatively small.

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[31] *See, e.g.*, Minn. Stat. § 148B.39 (2022) (privilege for marriage and family therapists); Minn. Stat. § 148E.230, subd. 3 (2022) (confidentiality of social worker-client relationship); Minn. Stat. § 148F.13, subds. 1, 6 (2022) (confidentiality of private information from alcohol or drug counseling, and limits on access to records from that counseling).

7. Miscellaneous amendments should be made to update the Rules, conform the Rules to existing practices, and clarify procedures under the Rules.

The court asked the Committee to recommend amendments to a variety of Rules to update terminology and clarify procedures under the Rules. *See* Aug. 2023 Order at 30–31 (agreeing with the ABA's conclusion "that the language of Rules 11, 19, [and] 24 . . . should be reviewed and recommendations made on how the language of these rules can be updated or clarified").

Specific Recommendations.

a. Rule 11 should be amended to clarify the procedures for resigning from the Minnesota bar.

In its current form, Rule 11 acknowledges the court's authority to grant or deny a lawyer's petition to resign from the bar, then comments on serving and filing the petition, and finishes with the Director's objections (if any). The ABA recommended that this rule be amended to incorporate the court's case-law standard for granting a petition to resign from the Minnesota bar, namely, that resignation is not allowed when misconduct allegations are pending. *See In re Mose*, 993 N.W.2d 251, 264 n.12 (Minn. 2023).

After reviewing the rule and the actual Office processes when a petition to resign is received, the Committee concluded that in addition to adding the legal standard for resignation to the rule, guidance and clarity would be promoted with further detail on the steps the lawyer must take when petitioning to resign, the Director's obligations when a compliant petition is received, and the disposition of a petition. For further guidance, the Committee also recommends an advisory note to accompany the rule, which identifies the legal standard for resigning from the bar.

The Committee's recommended version of Rule 11 is set out below. The Committee recommends that Rule 11 as amended be made effective immediately, because the amendments codify and explain existing legal standards and Office practices. As amended, Rule 11 should be made effective for petitions that are filed on or after the effective date.

RULE 11. RESIGNATION

A lawyer who is not suspended or disbarred in any jurisdiction may resign from the Minnesota bar by serving a copy of the petition, substantially in the form provided by the Director, upon the Director and filing the petition, along with proof of the service, with the Court.

The~~is~~ Director shall notify the Court, in writing, of any objections to the petition within 14 days after service of the petition. The Court will consider the Director's objections, if any, to the petition and may at any time, ~~with or without hearing and~~ with any conditions it may deem appropriate, grant or deny the ~~a~~ lawyer's petition to resign from the bar. The Court may also 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.

Unless otherwise ordered by the Court, no petition to resign from the Minnesota bar shall be granted while a lawyer is under investigation for misconduct, when one or more charges of misconduct are pending that, if true, would warrant public discipline, or when the lawyer is not in good standing under the Rules for Admission to the Bar.

~~A copy of a lawyer's petition to resign from the bar shall be served upon the Director. The petition with proof of service 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.~~

Advisory Committee Comment

The 2024 amendment to Rule 11 clarifies the existing practice that resignation while under investigation is typically not allowed, and encompasses the standard expressed in other cases. *See In re Mose*, 993 N.W.2d 251, 264 n.12 (Minn. 2023) (stating that a lawyer is not allowed to resign when allegations of serious misconduct are pending or when the lawyer is not in good standing); *In re Jones*, 383 N.W.2d 303, 307 (Minn. 1986) (stating that a lawyer is not allowed to resign when allegations of misconduct that would warrant public discipline are pending).

b. Rule 14 should be amended to eliminate the panel option for a discipline petition and update the language for proceedings before the Supreme Court.

Two changes are proposed to Rule 14, which governs the proceedings on a public petition for discipline.

First, the court adopted the ABA's recommendation to "eliminate the option to use a Board panel rather than a referee to hear a discipline petition." Aug. 2023 Order at 15 n.10. Thus, as shown below, paragraph (f) in Rule 14 is deleted.

Second, the Committee concluded that the language of paragraph (g), which governs proceedings before the Supreme Court, should be updated to reflect current practices: the input needed from the parties before an order with a briefing schedule is filed, and the absence of cover colors for briefs in the electronic filing age. Specifically, before a briefing schedule is established, it is helpful to know whether a transcript has been ordered, and if it has, whether appropriate financial arrangements have been made. Typically, the Director provides this input to the court, via written notice filed with the Clerk of Appellate Courts. Language regarding the color of brief covers is eliminated, and because a hearing may not be held in every case (thus, a proposed "if ordered" clause at the end of the paragraph), the title of the paragraph is changed to "proceedings" before the court.

These proposed amendments are shown below. The Committee recommends that these amendments be made effective on adoption and applied to all cases pending on or filed on or after the effective date. The Committee is unaware of any Panel that is now acting in place of a referee, which means that deleting paragraph (f) will not have an identifiable impact on pending matters. The proposed amendment to paragraph (g)—which would be recodified as (f) once the preceding paragraph is deleted—to delete the requirement for color covers on briefs can also be made effective immediately, as parties who file electronically do not use color covers. The second, separate, amendment to current paragraph (g) adopts existing practice, as "appropriate financial arrangements" for transcripts are currently required.

RULE 14. HEARING ON PETITION FOR DISCIPLINARY ACTION.

* * *

~~**(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 18 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).~~

(~~f~~g) ~~Hearing~~ Proceedings Before the Supreme Court. Unless the Court orders otherwise, ~~This Court~~ within thirty days after ~~of~~ the referee's findings, conclusions and recommendations are filed, the Director must notify the Court, by a written request filed with the Clerk of Appellate Courts, whether a transcript has been ordered under paragraph (e) of this Rule and if so, whether appropriate financial arrangements for the transcript have been made. The Court shall issue an order establishing a briefing schedule and ~~set a time for hearing before this Court. The order shall specify times for briefs and~~ stating whether oral arguments will be held. ~~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 considered and decided ~~heard~~ upon the record, briefs, and if ordered, oral arguments.

c. Rule 19 should be amended to clarify the admissibility of evidence of prior misconduct.

The ABA recommended that the admissibility standards set out in Rule 19(b), RLPR, be clarified, noting that sub-paragraphs (1) and (2) in paragraph (b) seem to contradict each other.

After review of the rule, the Committee agreed that the appropriate fix is to eliminate paragraph (b)(2) in its entirety. This proposed amendment is set out below. As the Committee could not identify a single recent case in which paragraph (b) of Rule 19 was at issue and is not aware of a pending case in which this provision has been asserted, this amendment can be made effective on adoption and applied to all cases pending on or filed on or after that date.

RULE 19. EFFECT OF PREVIOUS PROCEEDINGS

* * *

(b) Disciplinary Proceedings.

(1) Conduct Previously Considered And Investigated Where Discipline Was Not Warranted. Conduct considered in previous lawyer disciplinary proceedings of any jurisdiction, including revocation of conditional admission proceedings, 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, including revocation of conditional admission proceedings which was not investigated, is admissible, even if it was determined in the proceedings without investigation that discipline was not warranted.~~

(2~~3~~) **Previous Finding**. A finding in previous disciplinary proceedings that a lawyer committed conduct warranting discipline or revocation, modification or extension of conditional admission is, in proceedings under these Rules, conclusive evidence that the lawyer committed the conduct.

(3~~4~~) **Previous Discipline**. The fact that the lawyer received discipline in previous disciplinary proceedings, including revocation, modification or extension of conditional admission, 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:

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d. Rule 24 should be amended to clarify the procedures for taxing costs and disbursements.

Rule 24, RLPR, currently allows costs ($900) and necessarily incurred disbursements, typically "those normally assessed in appellate proceedings" before the court and those "normally recoverable" in the district court, Rule 24(b), RLPR, to be taxed. The rule also incorporates the timing and objection requirements from the appellate rules, Rule 24(c), RLPR (using the timing and objection requirements "set forth in the Rules of Civil Appellate Procedure"); *see* Minn. R. Civ. App. P. 139.03.

The ABA recommended that Rule 24 be clarified to allow taxation solely against a "disciplined" lawyer rather than a prevailing party, which would be "consistent with most jurisdictions." ABA Rept. at 87. The court adopted the ABA's broad recommendation to clarify the language of the rule but did not comment on the ABA's point about one-way taxation. Aug. 2023 Order at 31. The Committee recommends that the court retain language that allows a lawyer to tax costs and disbursements. To clarify, however, that possibility arises in proceedings before the Supreme Court not simply when the lawyer prevails, but only when "the Court concludes that *no* discipline is warranted." (emphasis added). This clarification avoids the possibility of a request to tax when a lawyer is disciplined on some, but not all, of the charges in the complaint. This point

is made clear in a proposed Advisory Committee Comment included with the recommended amendments.

The Committee also recommends non-substantive amendments for internal consistency in the rule, i.e., using "lawyer" consistently, rather than the occasional references to "attorney."

Because the proposed amendments are largely clarifying and do not substantively change the operation of the rule, the Committee believes these amendments could be made effective on adoption and applied to cases pending on or filed on or after the date of the court's order.

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 under these rules in which discipline is imposed, ~~or revocation of~~ conditional admission is revoked, or the Court concludes that no discipline is warranted, ~~decided by this Court shall recover~~ costs in the amount of $900 shall be recovered.

(b) Disbursements. Unless ~~otherwise ordered by~~ this Court orders otherwise, ~~the prevailing party~~ in any proceeding ~~disciplinary proceedings or revocation of conditional admission proceedings~~ decided by this Court in which discipline is imposed, conditional admission is revoked, or the Court concludes that no discipline is warranted, ~~shall recover,~~ in addition to the costs specified in subdivision (a), all disbursements necessarily incurred after the filing of a petition for disciplinary action or a petition for revocation of conditional admission under Rule 12 may be recovered. 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 Rule 139 of 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, disbarment, or revocation of conditional admission is ordered. No suspended ~~attorney~~ lawyer shall be permitted to resume practice and no disbarred ~~attorney~~ lawyer may file a petition for reinstatement if the amount of the costs and disbursements taxed under this Rule has not been fully paid. A lawyer whose conditional admission has been revoked may not file an application for admission to the bar until the amount of the costs and disbursements taxed under this Rule has been fully paid.

Advisory Committee Comment

> The [date] amendments to Rule 24 clarify that the Director may tax costs and disbursements when discipline is imposed or conditional admission is revoked, while a respondent lawyer may tax costs and disbursements when the Supreme Court concludes that no discipline is warranted and therefore dismisses the Director's petition in its entirety.

e. Rule 15 should be amended to include possible conditions for public probation.

Rule 15, RLPR, sets out the range of dispositions the Court may order on "the conclusion of the proceedings," one of which is public probation, "with such conditions as this Court may specify." Rule 15(a)(4), RLPR. The ABA recommended that the court adopt a "separate, more detailed" rule to govern the terms and conditions for public probation. ABA Rept. at 81.

The court recognized that transparency and accountability are promoted by putting specific probation terms in the rule, but flexibility is needed to address the particular circumstances in a specific case. Aug. 2023 Order at 33. Thus, the court asked the Committee to provide "input on probation terms that would benefit from codification in" the rule. *Id*.

After review of the current organization of paragraph (a), the Committee recommends a restructuring of the listed dispositions. Specifically, the specific discipline sanctions (disbar, suspend, etc.) are listed first, followed by additional terms that are tailored to a particular case (restitution, costs and disbursements), and concluding with a general reference to the court's discretion ("such other disposition as this Court deems appropriate").

Within paragraph (a)(4), the Committee recommends amendments to list some of the more common probation terms (continuing education, participation in evaluations, assessments, or treatment programs), and monitoring terms (self-assessments and mentoring). The language clearly signals that the list is not exhaustive ("among other terms," and stating the probation "may include" one or more of the terms). Note also that the Committee recommends moving the requirement to take a professional responsibility examination into paragraph (4), rather than leaving it as a standalone disposition.[32]

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[32] Although the court eliminated the requirement to take the written examination on professional responsibility in a reinstatement proceeding, Aug. 2023 Order at 18 n.11, it did not signal that this requirement would no longer be a possible disposition in imposing discipline.

The Committee recommends adding a paragraph on the possibility of restitution—paying amounts that have been ordered to be paid, such as an obligation to pay restitution of fees due but not reimbursed, or sanctions owed, *see In re Lennington*, 948 N.W.2d 685, 686 (Minn. 2020) (order) (requiring suspended lawyer to refund unearned fees), because satisfaction of this obligation can be a condition for reinstatement. For clarity, transparency, and guidance, the Committee believes lawyers facing discipline should know that a restitution obligation, separate and apart from the possibility of an order covering costs and disbursements, may be ordered.

Finally, clarity is advanced by consolidating the current references to costs (sub-paragraphs (3) and (8)) into one location (now, sub-paragraph (7)); and placing all dispositions for conditional admission cases into one paragraph (now, sub-paragraph (8)).

The Committee believes these amendments can be made effective immediately and applied to cases pending on or filed on or after the effective date. The substantive language—adding possible probation terms, adding a provision for restitution—does not change the law; it simply provides additional notice about currently available dispositions. The remainder of the amendments merely restructure the rule into a more logical order.

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;~~ Reprimand the lawyer;

(4) Place the lawyer on probation, either supervised or unsupervised, ~~probationary status~~ for a stated period ~~of time~~ or until further order of this Court~~, with such conditions as this Court may specify and to be supervised by the Director~~. Among other terms, probation terms may include requirements for law office management assistance, continuing legal education courses, trust account education, ethics education, successful completion within a specified time of the written examination required for applicants for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility, participation in a lawyer assistance program, assessment of and treatment for medical or behavioral health issues including mental health and substance use issues, verified attendance at abstinence recovery meetings, self-assessments, and mentorship;

~~(5) Reprimand the lawyer;~~

(5) Issue a private admonition or dismiss the petition for disciplinary action, in which case the Court's order may denominate the lawyer by number or randomly selected initials and may direct that the remainder of the record be sealed;

~~(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;~~

(6) Order the lawyer to pay restitution;

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

(7)~~(8)~~ Order ~~Require~~ the lawyer to pay costs and disbursements~~;~~ pursuant to Rule 24 of these rules. In ~~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;

~~(9) Dismiss the petition for disciplinary action or petition for revocation of conditional admission, in which case the Court's order may denominate the lawyer by number or randomly selected initials and may direct that the remainder of the record be sealed; or~~

(8)~~(10)~~ Revoke, modify, or extend a conditional admission agreement, or dismiss a petition for revocation of conditional admission; or

(9) Make such other disposition as this Court deems appropriate.

f. The time-computation rule from the Minnesota Rules of Civil Procedure should be incorporated into the Rules on Lawyers Professional Responsibility.

As it worked with rule language that used days for certain events, i.e., 270 days for the Director's investigation, *supra* at 52, 180 days for reinstatement by petition, *supra* at 30, the Committee concluded that a specific statement on time computation, similar to that used in other court rules, would be beneficial. Thus, the Committee recommends an amendment to Rule 1 to incorporate the time computation standard from the Rules of Civil Procedure. This amendment can be made effective on adoption, and applied to pending investigations, cases, and complaints, and public discipline cases filed on or after the date of the court's order.

RULE 1. DEFINITIONS

As used in these Rules:

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(13) In computing any period of time prescribed or allowed by these rules or order of court, the method of computation specified in Rule 6.01, Minnesota Rules of Civil Procedure, shall be used.

8. Amendments should be made to other rules to conform to the changes recommended here.

The Committee's final step involved a holistic review of the Rules on Lawyers Professional Responsibility, to identify provisions that require an amendment to conform the language of the rule to the changes recommended here. These recommended amendments fall into two categories:

changing "probable cause" and references to that term to "reasonable cause" and updating the rule references; and, adding provisions regarding the proposed diversion program for consistency in the treatment of, for example, private probation, i.e., disclosure and confidentiality.

Set out below are the recommended amendments that resulted from this review. The Committee believes the recommended amendments in the first category (probable cause to reasonable cause) can be made effective immediately. The recommended amendments in the second category, however, should follow the effective date adopted for the diversion program.

RULE 6Z. COMPLAINTS INVOLVING JUDGES

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

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(3) Authority of Board on Judicial Standards to Proceed Directly to Public Charges. If ~~probable~~ reasonable cause has been determined under Rule 9(a)~~(j)(1)(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.

RULE 8. DIRECTOR'S INVESTIGATION

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(d) Disposition.

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(6) If, in a matter, with or without a complaint, the Director determines that diversion under Rule 31 of these Rules is appropriate, the Director shall proceed as provided in that rule.

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:

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(2) After ~~probable~~ reasonable cause has been determined under Rule 9(a)~~(j)(1)(ii) or (iv)~~ or proceedings before a referee or this Court have been commenced under these Rules;

***

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

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(5) The fact that stipulated probation has been approved under Rule 8(d)(3) or 8(e), or a diversion agreement has been entered into under Rule 31 of these Rules;

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(c) Records after Determination of ~~Probable~~ Reasonable Cause or Commencement of Referee or Court Proceedings. Except as ordered by the referee or this Court and except for work product, after ~~probable~~ reasonable cause has been determined under Rule 9(a)~~(j)(1)(ii) or (iv)~~ 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.

RULE 21. PRIVILEGE~~:~~; IMMUNITY

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(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 or diversion programs, shall be immune from suit for any conduct in the course of their official duties.

IV. SUMMARY: RECOMMENDED EFFECTIVE DATES

RULE	EFFECTIVE DATE	APPLICATION
Rule 1	**Immediately upon adoption**	**All proceedings brought before panels on or after the effective date, and cases pending on or filed on or after the effective date**
Rule 4	**Immediately upon adoption**	**All matters**
Rule 5	**Immediately upon adoption**	**All matters**
Rule 6	**90 days after adoption**	**All complaints submitted and investigations commenced on or after the effective date**
Rule 6Z	**Immediately upon adoption**	**Proceedings commenced before a panel on or after the effective date**
Rule 7	**90 days after adoption**	**All complaints submitted and investigations commenced on or after the effective date**
Rule 8	**90 days after adoption**	**All complaints submitted and investigations commenced on or after the effective date**
Rule 9	**Immediately upon adoption**	**Proceedings commenced before a panel on or after the effective date**
Rule 11	**Immediately upon adoption**	**Absent contrary directions in court order suspending lawyer, petitions filed on or after the effective date and lawyers suspended on or after the effective date**
Rule 14	**Immediately upon adoption**	**All cases pending on, or filed on or after, the effective date**
Rule 15	**Immediately upon adoption**	**All cases pending on, or filed on or after, the effective date**
Rule 18	**Immediately upon adoption**	**Lawyers suspended on or after the effective date**
Rule 20	**Paragraphs (a)(2) and (c) effective immediately; remaining amendments effective on the same schedule as proposed rule for diversion program**	**Paragraphs (a)(2) and (c) applied to proceedings commenced on or after the effective date; remaining amendments applied to the same proceedings and cases as proposed rule for diversion program**
Rule 21	**Effective on the same schedule as proposed rule for diversion program**	**Applied to the same proceedings and cases as proposed rule for diversion program**
Rule 24	**Immediately upon adoption**	**All cases pending on, or filed on or after, the effective date**
Rule 28	**Immediately upon adoption**	**All cases pending on, or filed on or after, the effective date**
Rule 31 (Diversion program)	**Minimum 6 months after adoption**	

V. MINORITY REPORTS ON EXPUNGEMENT RECOMMENDATIONS FOR DIVERSION PROGRAM AND PROPOSED AMENDMENTS TO RULE 8(a), RLPR.

Minority Report—Expungement and Diversion

A diversion program is likely to be a beneficial addition to Minnesota's discipline system. States that have a diversion program use it successfully to address minor misconduct with an aim toward educating the lawyer so that both the lawyer and future clients of the lawyer may benefit in a way that imposing private discipline upon the lawyer may not. The diversion rule recommended to the court by the Committee anticipates a diversion program that encompasses situations that are minor but also include misconduct that ordinarily would warrant public discipline in the form of a public reprimand. The scope of the program is not problematic (and is supported by the Director), but the expungement rule proposed for the program, allowing expungement of records five years after completion of diversion, will likely limit the Director's discretionary use of the diversion rule in many cases.

History of lawyer misconduct is important. Numerous lawyers have prior discipline, usually private discipline, and yet continue to engage in misconduct warranting some form of discipline. Both the court and the Director consider the nature and extent of prior discipline in determining the appropriate disposition in a current matter. Lawyers are expected to show a renewed commitment to the ethical practice of law after discipline of any kind, *In re Milloy*, 571 N.W.2d 37, 45 (Minn. 1997), and the overwhelming majority of lawyers have lengthy careers without discipline. To see lawyers engage in additional misconduct that violates the ethics rules after being disciplined reflects poorly on the profession in many ways. Further, conduct that warrants discipline sometimes occurs after lengthy periods without misconduct, but the fact that a lawyer has been disciplined over time is still notable.

The Director supports a diversion rule that allows the Director access to a lawyer's entire history (excluding of course dismissed matters which are expunged after three years) when determining whether to enter into a diversion agreement. Although diversion is not discipline, it is a program to be used in lieu of discipline and is thus not akin to a dismissal where no misconduct was found. For example, in a recent trust account violation matter, the fact that a lawyer previously engaged in misconduct that involved trust account books and records (which would currently warrant either private probation or a public reprimand), and completed diversion for that misconduct, is an important and relevant factor in determining the best way to handle a new trust

account matter, even if it happens 8 or 10 years later. The proper handling of a trust account is one of the most serious ethical responsibilities for lawyers, and also one where things can go wrong. Remedial education can be an appropriate tool in lieu of discipline. But after remedial effort, if a lawyer again has trust account misconduct, diversion would be inappropriate. Under the proposed expungement requirement, however, the Director would be without that information if the information is expunged after 5 years. Accordingly, the Director might lean toward discipline in the first instance on many matters, rather than diversion, to ensure a record of the misconduct is kept.

The Director supports modifications to Rule 20 that would limit disclosure of matters closed with diversion to internal use only by the Director (i.e., not to be disclosed as prior discipline, not disclosable by the Director to third parties requesting disciplinary histories, and not admissible in subsequent discipline proceedings except as impeachment). If the Director has access to the appropriate history, the incentive to discipline is minimized and the diversion program may be broadly utilized.

Susan M. Humiston, Director, Office of Lawyers Professional Responsibility

Minority Report—Rule 8(a)—deadlines

Rule 2 emphasizes that cases of unprofessional conduct should be "promptly investigated and disposed of with fairness and justice," and that discipline proceedings should be "commenced in those cases where investigation discloses they are warranted." Since the Office of the Director was created, timeliness of investigations and resulting discipline proceedings has been much debated. Most complaints result in dismissal; the average time for investigations that result in dismissals is between 6 and 7 months (or approximately 210 days). Generally, this is because dismissals are prioritized. Sometimes, dismissals take significantly more time, and the reasons for that vary greatly. Further, when discipline is the appropriate result of an investigation, it usually takes significantly longer to get to the point of being able to issue charges or file a petition.

The court referred to the Director, in conjunction with the State Court Administrator, the development and implementation of case processing standards. Aug. 2023 Order at 34. This referral was based upon the recommendation of the ABA committee to refine the case processing guidelines in place. As part of its recommendation, the ABA committee expressly "urge[d] the Court not to incorporate time metrics or guidelines into its Rules on Lawyers Professional Responsibility." (Report at 52.) Very few states have processing timelines or metrics in their rules in the first instance, and the ABA committee emphasized that it is "not aware of other jurisdictions [beyond Maryland where it is not enforced] where failure to meet time metrics can result in the dismissal of a matter, and [the ABA committee] does not agree with or support such a provision."

The Committee, however, has chosen to recommend to the court that time metrics and deadlines be incorporated in the rules: a 270-day deadline, with dismissal for non-compliance as a potential consequence. Although procedures are also included to extend the timeline in 90-day increments with Board Chair approval, the procedures for doing so involve the Board Chair in case processing and priority decisions, where the court has leaned toward separating the Office and the Board, and under circumstances where there is no remedy if there is disagreement.

Case processing times (and priorities within those timelines) are a function of many factors as stated in the ABA report (see page 55). The Director's Office is working diligently to address the backlog of cases that developed during the pandemic and period of staff turnover, while building capacity and improving case reporting capabilities. Additional funding for the necessary staffing that would be required to meet the Committee's proposed deadline for investigations may not be available as significant increases in attorney registration fees are already likely needed to

meet existing financial obligations. Further, the revised rules as a whole, although clearer, will not materially improve efficiencies in the Director's Office (with the exception of reinstatements, which impacts only a handful of cases a year). The net impact of diversion on case processing efficiencies and timelines (as compared to supervision and implementation of the program) is yet to be determined. And, the court rejected several ABA recommendations that would transfer to other entities several of the administrative responsibilities that currently consume significant time of office personnel, such as the ethics hotline and trusteeships.

Determining realistic case processing timeliness for the variety of cases that exist (because one size does not fit all) is a significant project and one that is planned as directed with the assistance of the State Court Administrator. This action should take place before appropriate timelines, whether in the rules or elsewhere, can be determined. Further, updating existing technology so that reporting can be developed that reliably measures performance against the to-be-developed metrics without lots of manual labor is also a significant project and one that involves technology costs that are yet to be determined. Adopting jurisdictional deadlines that are not realistic, that incentivize curtailing or abbreviating investigations, that do not account for the numerous other obligations that office personnel have, that involve the Board Chair in determining case processing decisions and priorities that may go beyond the scope of the merits of the case, and that can be easily weaponized by partially cooperative respondents is not in the best interest of any discipline system. Further, the recommended deadlines do not address the underlying concerns surrounding timelines in completing investigations, while placing more burdens on the discipline system. For these reasons, the Director concurs with the ABA report that case processing timelines (as compared to response timelines) should not be incorporated into the rules, and thus the Director does not support the proposed Rule 8(a) amendments, with the exception of Rule 8(a)(1) and (a)(2). Panhia Vang agrees with the Director's position and joins in the Rule 8(a) section of the minority report.

Susan M. Humiston, Director, Office of Lawyers Professional Responsibility

Panhia Vang

INDEX OF EXHIBITS

A.	Committee Meeting Agendas, October 2023-June 2024
B.	Minutes from Committee Meetings, October 2023-June 2024
C.	Committee WorkTable (June 2024)
D.	Proposed Committee Amendments—All Approved (Final)
E.	Notice re: Public Input Sought for the Rules on Lawyers Professional Responsibility
F.	Public Comment Input Form
G.	Summary re: Public Input on the Rules on Lawyers Professional Responsibility
H.	Sample Questionnaire and Checklist for Reinstatement (January 2024)

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8008

ORDER APPOINTING IMPLEMENTATION COMMITTEE MEMBERS

On March 12, 2024, we issued an order regarding the Minnesota Board of Law Examiners' (Board) comprehensive study of the Minnesota bar examination and alternative approaches to evaluating competency for admission to practice law in Minnesota. In addition to accepting the Board's recommendation to adopt the Next Generation of the Bar Examination, we also created an Implementation Committee to further explore and develop a curricular-based pathway for assessment. In addition, we also directed that, although priority should be given to the curricular-based pathway for assessment, the Implementation Committee should also further explore a supervised practice-based pathway for assessment.

In our March 12 order, we established the committee composition requirements and requested the submission of applications. Based on the applications received, we have increased the committee from 25 to 29 members.

IT IS HEREBY ORDERED THAT:

1. The following persons are appointed as members of the Implementation Committee created by the court's March 12, 2024 order, and which will now be designated as the Alternative Pathways Implementation Committee:

Representatives from each of the Minnesota law schools:

Kate Kruse – Professor of Law, Mitchell Hamline School of Law

Lynn LeMoine – Dean of Students, Mitchell Hamline School of Law

Steve Meili – Assistant Dean for Clinical Education, University of Minnesota Law School

Kim Ronning – Director of Academic and Bar Support, University of Minnesota Law School

Benjamin Carpenter – Associate Professor, University of St. Thomas School of Law

Debbie Shapiro – Director of Academic Achievement and Bar Success, University of St. Thomas School of Law

Members of the Board of Law Examiners:

Thomas Boyd – Partner, Winthrop & Weinstine

Patricia Beety – General Counsel, League of Minnesota Cities and the League of Minnesota Cities Insurance Trust

John Koneck – Partner, Fredrikson & Byron

Law students:

Abdulla Ali – University of St. Thomas School of Law

Tate Thielfoldt – University of St. Thomas School of Law

Denley Wenner – University of St. Thomas School of Law

Representatives from the Minnesota State Bar Association, including at least one from greater Minnesota:

Leanne Fuith – Professor, Mitchell Hamline School of Law

David Schultz – Professor, Hamline University

Joe Van Thomme – Shareholder, Eckberg Lammers

Representative from the Minnesota Disability Bar Association:

Allison Quinn – Director of Disability and Student Services, Mitchell Hamline School of Law

Lawyer licensed to practice law in Minnesota who sat for the Uniform Bar Examination in any state within the last 5 years:

Marcelo Neblett – Assistant County Attorney, Ramsey County Attorney's Office

Member of the Lawyers Professional Responsibility Board:

Sharon Van Leer – Director, Diversity, Equity, and Inclusion, Mitchell Hamline School of Law

Expert on alternative pathways to licensure:

Carol L. Chomsky – Professor Emeritus, University of Minnesota Law School

Expert on assessment:

Deniz S. Ones – Professor of Industrial/Organizational Psychology, University of Minnesota

Non-lawyer member of the public:

Thomas Weber – Senior Director of Special Initiatives, The Minneapolis Foundation

Lawyers licensed to practice law in Minnesota:

Chase L. Andersen – Case Manager, Lawyers Concerned for Lawyers

Wade S. Davis – Associate Professor of Business Law, Minnesota State University Mankato

Dyan J. Ebert – Shareholder, Quinlivan & Hughes PA

Jada Lewis – Civil Division Director (General Counsel), Ramsey County Attorney's Office

Stephen P. Lucke – Mediator and Arbitrator, JAMS

Danielle Oxendine Molliver – Pro Bono Attorney, Robins Kaplan/Legal Rights Center

Ken D. Schueler – Shareholder, Dunlap & Seeger

Leah Stauber Pattni – Assistant County Attorney, St. Louis County Attorney's Office

2. Thomas Boyd is designated as chair of the Committee.

3. Emily Eschweiler, Director of the Board of Law Examiners, is appointed as an ex officio, nonvoting member of the Committee.

4. We invite one representative from the Institute for the Advancement of the American Legal System ("IAALS") and the National Conference of Bar Examiners ("NCBE") to serve as ex officio, nonvoting members of the Committee. The names of the representatives must be submitted to the Clerk of the Appellate Courts on or before September 9, 2024.

5. The Board of Law Examiners will provide the Committee with technical and administrative assistance.

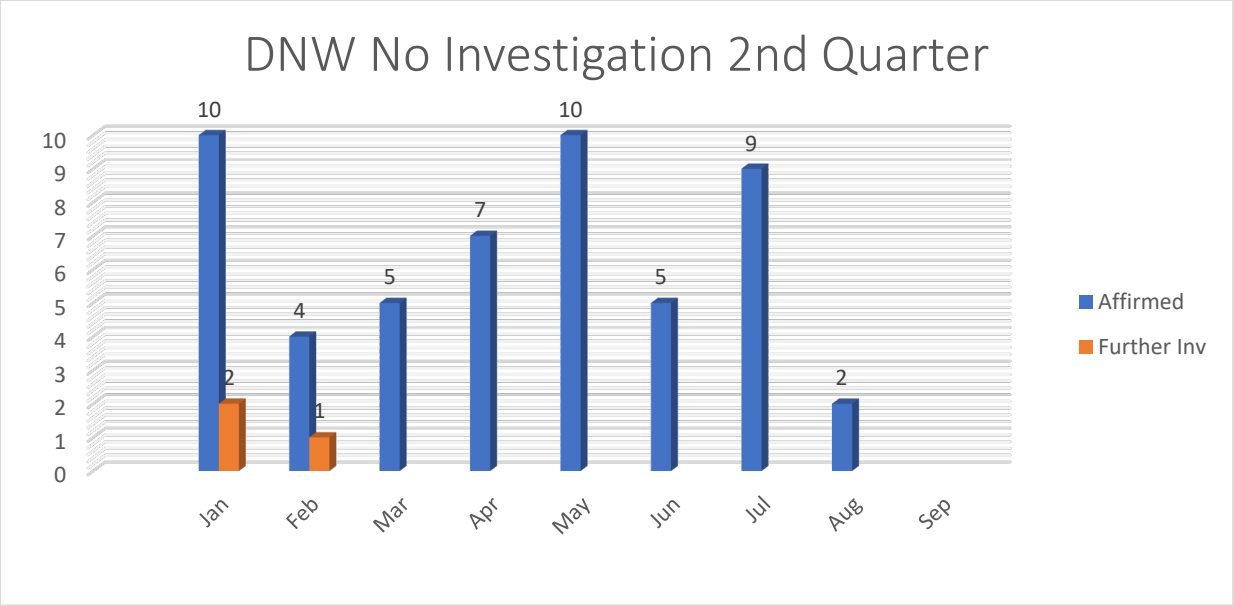
6. Per our March 12, 2024 order, the Committee must file its report with recommendations for rule amendments related to an alternative curricular-based pathway for assessment on or before July 1, 2026.

7. Per our March 12, 2024 order, the Committee must file its report with recommendations related to an alternative supervised practice-based pathway for assessment on or before July 1, 2027.

Dated: August 15, 2024

BY THE COURT:

Natalie E. Hudson
Chief Justice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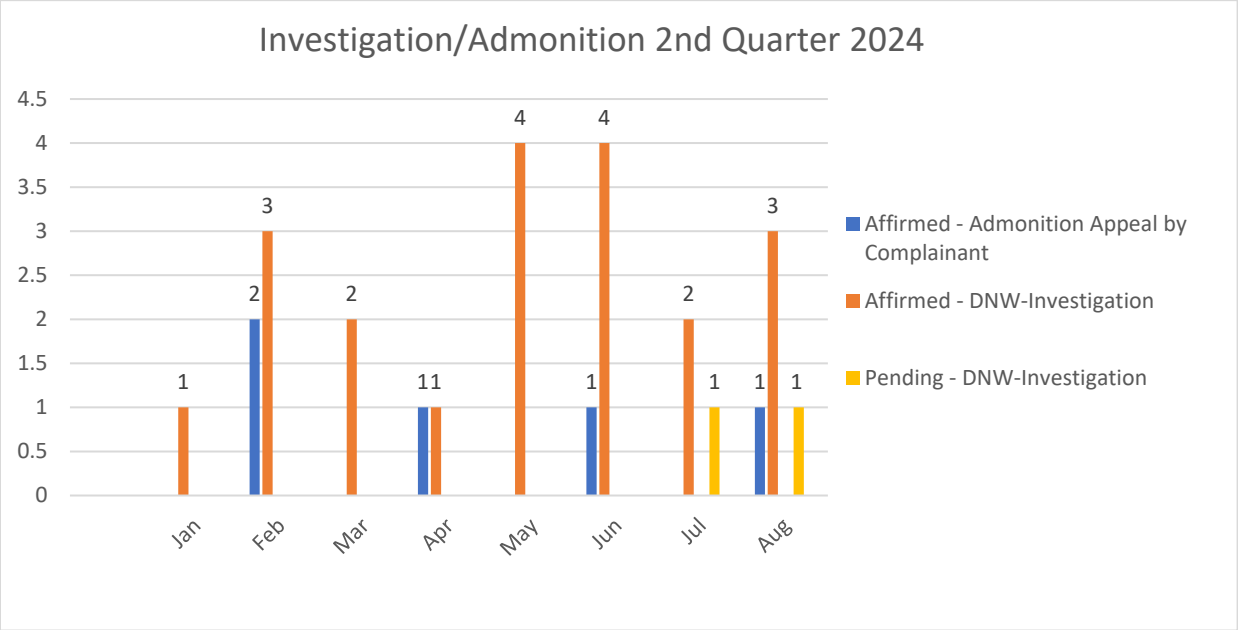
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