STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF THE BOARD ON JUDICIAL STANDARDS

IT IS HEREBY ORDERED that a hearing be had before this court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on July 9, 2008 at 2:00 p.m., to consider the report filed on March 14, 2008, by the Supreme Court Advisory Committee on the Rules of the Board on Judicial Standards, recommending amendments to the rules. A copy of the report is annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King, Jr. Boulevard, St. Paul, Minnesota 55155, on or before June 27, 2008, and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before June 27, 2008.

Dated: April 18, 2008

BY THE COURT:

OFFICE OF
APPELLATE COURTS

APR 22 2008

FILED

Russell A. Anderson
Chief Justice

GARY J. PAGLIACCETTI
JUDGE OF THE DISTRICT COURT
SIXTH JUDICIAL DISTRICT
ST. LOUIS COUNTY COURT HOUSE
VIRGINIA, MINNESOTA 55792

March 14, 2008

Chief Justice Russell Anderson
Minnesota Supreme Court
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Justice Paul H. Anderson
Minnesota Supreme Court
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Dear Chief Justice Anderson and Associate Justice Anderson,

The Committee on Rules of the Board on Judicial Standards submits the attached Report and Proposed Amendments to the Minnesota Rules of the Board on Judicial Standards. The committee has proposed several significant changes. The committee suggests that the Court schedule a public hearing and provide interested persons with an opportunity to submit written comments regarding the proposed amendments.

I would at this time like to thank the Court for the opportunity to serve as chair of this committee. The committee members worked very hard on the rules, as I am sure you will gather from the report. It was a great pleasure and privilege to work with so many concerned and dedicated people.

Sincerely,

Gary J. Pagliaccetti

Encl.

REPORT AND PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF THE BOARD ON JUDICIAL STANDARDS

ADVISORY COMMITTEE ON RULES OF THE BOARD ON JUDICIAL STANDARDS

C4-85-697

March 14, 2008

Honorable Gary J. Pagliaccetti, Chair

Sen. Don Betzold
Hon. Tanya Bransford
Felicia J. Boyd
Hon. Edward Cleary
Annamarie Daley
Hon. Sam Hanson
Karen Janisch
Jeff Johnson[1]
Robert M.A. Johnson
Jeremy Lane
Cmdr. Bill Martinez
Hon. Leslie Metzen
Sharon Mohr
Hon. Tom Neuville[2]
Amy Rotenberg
Patrick Sexton
Rep. Steve Simon
Dane Smith
Rep. Steve Smith
Virginia Stringer
William Wernz
DePaul Willette
Hon. Bruce Willis

Hon. Paul H. Anderson
Supreme Court Liaison

Kelly Lyn Mitchell
Staff

[1] Jeff Johnson resigned from the committee in January 2008.
[2] Hon. Tom Neuville was a member of the Minnesota State Senate when he was appointed to the committee. He was appointed to the bench in January, 2008.

INTRODUCTION

The Advisory Committee on Rules of the Board on Judicial Standards was established on April 3, 2007, to review and recommend proposed changes to the Rules of the Board on Judicial Standards (see order establishing the committee in Appendix A). The committee met monthly from June 2007 to February 2008. The committee received public testimony at its first meeting (see Appendix D for list of presenters), welcomed and distributed additional written input throughout the course of the committee proceedings, and held a public forum to receive input regarding the recommendations set forth in this report on January 31, 2008 (see Appendix E for abstract of presentations made at the public hearing). The committee also sought advice and information about national trends in judicial discipline from Cynthia Gray, Director of the Center for Judicial Ethics.

The following report summarizes the issues considered by the Advisory Committee and the committee's recommended changes to the Rules of the Board on Judicial Standards. The report narrative is organized by topic. Following the report narrative is a complete text of the Rules of the Board on Judicial Standards and Advisory Committee comments incorporating the committee's proposed amendments.

SEPARATION OF ENFORCEMENT AND ADJUDICATORY FUNCTIONS

Among the most significant changes proposed in this report are those amendments recommended for the purpose of creating a distinction between the enforcement and adjudicatory functions by establishing the Board on Judicial Standards as the enforcement body, and the three-member hearing panel and Supreme Court as the adjudicators. As the rules are currently drafted, the board can be perceived as performing both functions, which raises issues about fundamental fairness and due process. One of the most significant examples of the current tangling of these functions is in current Rule 11(c), which permits the board, at the close of a public hearing, to substitute its findings for that of the hearing panel before the findings go to the Supreme Court. The committee believes it is important to more clearly delineate the board as the body that enforces the rules and the hearing panel and Supreme Court as the adjudicators. Thus, the committee has recommended limiting the dispositional powers of the board to low-level disciplines and diversionary actions, and expanding the powers of the hearing panel for cases proceeding to a public hearing. Appendix B is a flow chart illustrating how the complaint process will work if the proposed amendments in this report are accepted and promulgated by the Court. Some highlights of the proposed process are:

- Rule 6 is amended to codify the screening process utilized by the board's executive secretary to determine which complaints are summarily dismissed and which are investigated further. All complaints that are summarily dismissed are presented to a board member for review and approval. The executive secretary then conducts a preliminary evaluation of the remaining complaints.

- After a preliminary evaluation by the executive secretary, the board determines whether investigation is warranted. If an investigation is authorized, the board determines whether there is reasonable cause to believe the judge committed misconduct. The

reasonable cause standard is a change from the current "sufficient cause" standard, and is defined in the Rules.

- The investigation stage is made more robust by providing for notice to the judge when the board has authorized an investigation and allowing the judge an opportunity to both respond to the complaint in writing and to appear in person before the board or a panel of the board to answer questions about the alleged conduct. However, the rule also permits the board to withhold this initial notice to the judge for extraordinary and specific reasons. This mechanism provides the board flexibility in those situations when judicial retaliation is a potential consequence of notifying the judge of the complaint, such as when the complaint is filed by a member of the judge's staff.

- If the board finds there is not reasonable cause to believe the judge committed misconduct, the board dismisses the complaint. If the board finds there is reasonable cause to believe the judge committed misconduct, it may effect one of the following low-level dispositions: dismiss the complaint (with or without a letter of caution), enter into a deferred disposition agreement, issue a private admonition, issue a public reprimand (in limited cases), or issue a formal complaint.

- If the matter proceeds to a formal hearing, a hearing panel is appointed by the Supreme Court. The panel holds a hearing and makes findings of fact and conclusions of law. The presider of the panel is a judge, and has the powers of a district court judge rather than the currently limited powers of the "presider" and "factfinder." Upon a finding of clear and convincing evidence, the panel may dismiss the matter, enter into a deferred disposition agreement, issue a public reprimand, or recommend a disposition to the Supreme Court, including removal, suspension, or retirement.

- If the board disagrees with the findings or disposition of the hearing panel, the board may appeal the matter to the Supreme Court. The board cannot (as it now can) substitute its judgment for that of the hearing panel. If the panel recommends a disposition to the Court, the board's appeal must accompany the panel's recommendation when presented to the Court for review and action.

- The judge whose conduct is at issue has the same right of appeal as the board.

- The judge may enter into an agreement for a disposition by consent anytime after issuance of the formal complaint.

PROCEDURES FOR CASES INVOLVING JUDGES WHO MAY HAVE A DISABILITY

A second significant set of changes are those recommendations proposed to establish clearer and more comprehensive procedures for cases involving disability. In this context, the committee has recommended changes to the internal procedures of the board and procedures relating to requests made to the governor for disability retirement.

With regard to the procedures of the board, the term "disability" has been defined to include physical and mental conditions that interfere with the capacity of the judge to perform his or her duties, and also to include impairment due to alcohol and substance abuse. Additionally, current Rule 15, which contains limited provisions applicable to cases involving disability, has been considerably expanded so that it tracks closely with the complaint process for proceedings involving misconduct but clearly identifies variances in procedure relevant to the disability (see proposed Rule 16). Appendix C is a flow chart illustrating the process for cases involving an allegation that the judge has a disability. Some of the variances from the complaint process are:

- If the board finds reasonable cause to believe the judge has a disability, the board is limited to two dispositional options: entry into a deferred disposition agreement to allow the judge an opportunity to obtain treatment for the disability or issuance of a Formal Statement of Disability Proceeding, which moves the issue to the public hearing stage. This latter disposition would be appropriate when the board believes the outcome will be a recommendation for suspension or retirement.

- The main purpose of the public hearing stage is to determine whether there is clear and convincing evidence that the judge has a disability. However, if the judge has committed misconduct, the board may also issue a Formal Complaint and combine the hearings for the disability and misconduct determinations. If the hearings for the disability and misconduct determinations are combined, and the hearing panel finds clear and convincing evidence the judge committed misconduct, the panel must also determine whether the misconduct related to a disability.

- Parts of the public hearing may be closed for the purpose of discussing confidential medical records.

- If the Supreme Court suspends a judge due to disability, the judge may petition the board for reinstatement, and the board may take whatever measures it deems necessary to determine whether the disability has been removed.

The committee engaged in an extensive discussion regarding waiver of medical privilege. Currently, Rule 15 provides that if the judge denies the alleged mental or physical condition, the denial constitutes waiver of medical privilege. Thus, any allegation, regardless of merit, can lead to waiver of medical privilege simply based on the judge's denial. In contrast, proposed Rule 16 builds in some process before reaching that result. If the judge admits to the disability or uses a disability as a defense, the judge waives medical privilege. If the judge denies the disability, the board must determine whether there is credible evidence of a disability. It is anticipated this evidence will result from the board's investigation, and may take the form of witness statements, news reports, etc. The rule also provides that the board may consult with a qualified professional in the area of the disability to determine if the evidence before the board constitutes credible evidence. If so, medical privilege is waived. If not, medical privilege is not waived, and disciplinary proceedings resume. It should be noted that even if medical privilege is waived, the waiver is limited to "medical records relevant to the alleged disability."

Once medical privilege is waived, the board must determine whether there is reasonable cause to believe the judge has a disability. During this stage, the board can request that the judge submit to a medical examination. The committee engaged in lengthy discussion about what the result should be if a judge refuses to submit to the examination. As submitted, Rule 16(d)(5) states the judge will not be able to present the results of any independent examinations as evidence and that "the board may consider the judge's refusal or failure as evidence that the judge has a disability." Thus, if the judge denies that he or she has a disability and refuses to submit to an examination, the rule creates an adverse inference that the judge has a disability. All committee members were comfortable excluding evidence of independent examinations. But not all committee members were comfortable with the proposed adverse inference. Proponents of the provision set forth the following points in favor of retaining the adverse inference: (1) the adverse inference applies only to the reasonable cause determination at this stage of the proceedings; (2) the inference is permissive (the board does not *have* to make the inference); (3) the rule does not direct the board as to how much weight to give the inference; and (4) the next stage in the proceedings involves a full hearing, so the adverse inference does not deprive the judge of due process. Opponents of including the adverse inference in the rule set forth the following points in opposition: (1) the inference may cross constitutional boundaries, such as those implicated in compelling DNA or bodily fluids as evidence; (2) it is not necessary to go further in sanctioning the judge than refusing to admit independent examinations; and (3) it will be argued that the inference can be used at any subsequent stage of the proceedings, including by the hearing panel in making its dispositional determination. The committee voted by a margin of 9 to 3 to leave the adverse inference in the proposal.

With regard to procedures relating to requests made to the governor for disability retirement, new Rule 18 has been added to permit the governor to obtain a status report from the board detailing any pending complaints or investigations when a judge applies for a disability retirement.

COMPLAINTS RECEIVED DURING AN ELECTION CAMPAIGN

In 2002, the U.S. Supreme Court issued a decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), that struck down the "announce clause" of the Code of Judicial Conduct, which prohibited judicial candidates from announcing their views on political issues. In the wake of this decision, there has been a great deal of speculation as to how judicial elections are likely to become similar to legislative elections. To learn more about the current debates, the committee invited a presentation from Robin Wolpert, reporter for the Citizen's Commission for an Impartial Judiciary. Following the presentation, the committee discussed the issue, and determined that its primary concern was the speed at which complaints filed during an election cycle are handled by the board. If the complaint is made public, it may damage an individual's chances for election regardless of its merit. Research revealed that very few states have rules relating specifically to this topic, and that those states that do have rules confine the procedure to unethical behavior relating to the election. The committee concluded that any procedure developed for use in Minnesota should address two important components. First, the procedure should allow the board to act expeditiously. A complaint lodged publicly in the final weeks or days of an election has the potential to unfairly influence the outcome of the election. Second, the procedure should allow the board to issue a public statement exonerating the judge if

the complaint is found to be meritless. Though a basic tenet of the Rules is confidentiality, that principle should not be permitted to be used as a shield for persons making false statements during an election. Proposed Rule 6(e) incorporates these components.

BOARD JURISDICTION

In reviewing the rules generally, the committee concluded that the explanation of the board's jurisdiction in Rule 2 was confusing and needed clarification. Further, the committee questioned whether it continues to make sense that the jurisdiction of the board ceases when a judge retires or resigns from office. Members noted that in some cases, retirement or resignation is utilized by the judge as a mechanism to avoid judicial discipline. The committee believes, however, that there is value in continuing the disciplinary process to provide for greater judicial accountability, and value for the victims in having the board acknowledge they were wronged when there is indeed a finding of misconduct. The proposed amendments to Rule 2 clarify the board's jurisdiction, provide for continued board jurisdiction even after retirement or resignation unless the board determines that pursuing the matter is not a prudent use of the board's resources. The rule also clarifies that the Office of Lawyers Professional Responsibility can discipline a judge as a lawyer for misconduct committed while a judicial officer.

DISCLOSURE OF OUTCOMES TO THE COMPLAINANT

The committee believes it is very important to keep the complainant informed of the progress of his or her complaint, especially during the stages of the process that are confidential. Current Rule 5(a)(1) requires the board to notify the complainant when the board determines there is insufficient cause to proceed, and when the board issues a warning or recommends treatment or counseling under current Rule 6(f). But it does not appear the rules comprehensively require the complainant to be notified of *all* outcomes. To correct that, the committee has proposed new Rule 5(c), which is a broader, more encompassing directive to ensure that the complainant is kept informed throughout the entire proceeding.

PRIVATE ADMONITION REVIEW

The committee received criticism of the current procedures for issuing and contesting private judicial discipline. First, under current Rule 6(f)(1), the board may issue a warning that the conduct "may be cause for discipline." If the judge chooses to contest the warning, his or her only option is to request a public hearing under current Rule 6(g). This procedure launches what the board considered to be a low-level disciplinary matter into a full-fledged public proceeding. Moreover, this procedure places the hearing panel in the awkward position of having to determine whether there is clear and convincing evidence that the judge's conduct "*may* [have been] cause for discipline." The committee's proposed amendments address both the awkwardness of the evidentiary standard and the nature of the proceeding. First, proposed Rule 6(f)(4) requires that the board find reasonable cause to believe the judge committed misconduct, and permits issuance of a private admonition only in those cases in which the misconduct appears to be isolated and non-serious. Second, the proposed rule establishes a right for the judge to appeal the admonition: (1) first privately to a committee composed of former board members; then (2) publicly to the Supreme Court.

RECORDS RETENTION AND USE OF ALLEGATIONS FROM DISMISSED COMPLAINTS

Currently, Rule 17 requires that complaints dismissed due to insufficient cause be destroyed after three years. Complying with the rule requires administrative work to evaluate the file to determine if it is eligible for destruction, track the number of years that have passed, and determine whether subsequent complaints have been filed against the judge. The board completed a full review of its files in the late 1980's and early 1990's. When the committee began its work in June of 2007, it learned that a similar review had not been done since then, and was concerned that files that should have been expunged might be utilized in subsequent decisions of the board. The committee was assured that despite the fact that the files had not been physically destroyed, no board member has seen a file that should be expunged under the rules. The committee was informed that a person was hired to complete a review of the files during the summer of 2007 and has brought the expungement program current. The board does not currently have a computer tracking system that can assist in the expungement process, but the committee has been informed that the board will be looking at purchasing software for such a tracking system. The committee strongly recommends that some system be put in place, whether manual or electronic, to ensure that files are expunged on a regular basis in accordance with the expungement requirement in the Rules.

Related to this topic, the committee considered whether the expungement periods set forth in current Rule 17 should be amended. There are three categories of complaints received by the board: (1) complaints that are not actionable because they fall outside the board's jurisdiction, do not state a violation of the Code of Judicial Conduct, or are not discernable or understandable; (2) complaints that do state an offense under the code, and appear to warrant investigation, but that are ultimately dismissed; and (3) complaints that do state an offense under the code, appear to warrant investigation, and for which some form of disciplinary action is taken. There was some discussion within the committee as to whether complaints that fall into category 1 should be immediately destroyed. Proponents of this position argued that the complaints should not be maintained for any length of time because they are completely without merit but could nevertheless negatively reflect on the judge who is the subject of the complaint if they are maintained. Opponents of the position argued there should be one expungement standard for the board for ease of records management, that the complaints should be kept for the purpose of identifying a pattern of misconduct by the judge who is the subject of the complaint, and that the complaints may also be used by the board to identify complainants who repeatedly file the same complaint. The committee recommends that the current three-year retention period be maintained for all dismissed complaints, but also recommends that the Court promulgate new Rule 20, which clarifies that allegations from dismissed complaints may not be used in subsequent proceedings, but allegations from complaints dismissed with a letter of caution *may* potentially be used if the board reopens the matter, investigates, and proves the underlying conduct.

NOTICE OF BOARD MEMBER PARTICIPATION

The committee received a request to consider adopting a rule that would require disclosure of the names of board members who recused themselves from participating in actions

of the board. Persons speaking in favor of the proposal indicated it would help to dispel perceptions of bias and secrecy and that it would inform the judge as to those board members who rendered a particular judgment. Persons speaking against the proposal questioned why the information was needed, and asked whether a decision is any less meaningful if only certain members of the board participated in making it. In discussing this issue, the committee determined that it is more meaningful to communicate which board members *did* participate in the action than to communicate which members *did not* participate. Proposed Rules 5(c) and 6(f)(6) require that notice of board actions, along with the names of the board members who participated in the actions, be sent to the complainant and judge, respectively.

ADVISORY OPINIONS

At several of the full committee meetings, members asked whether the purpose of the board is to advise judges before they commit judicial misconduct, to discipline after misconduct has occurred, or both. The committee discussed the importance of providing a forum for judges seeking guidance on ethical dilemmas. Research indicated that most of the states that have rules governing the issuance of advisory opinions regarding judicial conduct also have a separate advisory committee established for this purpose. However, when considering the possibility of explicitly recognizing the advisory function in Minnesota, the committee concluded that a separate body is not necessary. Instead, the committee has proposed amending Rule 2 to include a provision recognizing the board's advisory function and establishing a procedure for issuance of the board's advisory opinions.

ENFORCEMENT OF THE 90-DAY RULE

Minn. Stat. § 546.27 requires that all "questions of fact and law, and all motions and matters submitted to a judge for a decision in trial and appellate matters" be decided within 90 days. The statute further directs the Board on Judicial Standards to regularly review judicial compliance with this requirement and authorizes the board to request the commissioner of finance to withhold the judge's salary for noncompliance. The requirements of this statute are colloquially referred to as "the 90-day rule." In accordance with this statutory directive, current Rule 2(a) empowers the board to review a judge's compliance with the statute. The committee was requested to make recommendations to change both the statute and the rule.

In discussing this issue, the committee noted several significant issues with regard to the text of the statute. First, the statute provides that the director of the state judicial information system will notify the executive secretary of the board when a matter exceeds 90 days without a disposition. In practice, the reports are not provided to the board in real time, but rather, are provided monthly, and display information relating to the month that is two months prior to the date the report was issued (e.g., in February, the board receives the report for cases that were under advisement the previous December). Second, though the statute appears to require the board to act immediately by stating "[t]he board shall notify the commissioner of finance of each judge not in compliance," the statute softens the directive by then providing that "[i]f the board finds that a judge has compelling reasons for noncompliance, it may decide not to issue the notice." This places the board in a quandary. Because the reports are received on a delayed schedule, it is imperative that the board follow up with the judges to determine if the cases

continue to be out of compliance. Additionally, even if the judge is out of compliance, the statute requires the board to follow up with the judge in order to determine whether there are "compelling reasons for noncompliance." Matters may then be delayed further until the board has an opportunity to meet and evaluate the information obtained. By the time the board has looked into the matter, met, and made a decision, the judge will usually have issued a decision. The statute implies that the judge must be in active noncompliance with the 90-day rule in order for the commissioner of finance to suspend the judge's pay, so even if the board determines the judge *was* out of compliance for a period of time, it cannot direct the commissioner of finance to impose the sanction of withholding the judge's pay. Third, the statute continues to view judicial pay as a paper process. The statute provides, "[n]o part of the salary of any judge shall be paid unless the voucher therefore be accompanied by a certificate of the judge that there has been full compliance with the requirements of this section." When the statute was enacted, judges were required upon receipt of their paychecks to certify that they were in compliance with the 90-day rule. Thus, judges were physically unable to obtain their pay if they were out of compliance and did not sign the certification. Today judges are paid by electronic funds transfer, so there is no longer a requirement that they make that certification. Each of these issues demonstrates that the statute is out of step with current processes. The committee recommends that the Supreme Court work with the Legislature to review the statute and update it so that, if it is to be enforced, it is workable and effective.

Corollary to the issues identified with regard to the statute, are issues related to whether and how the Rules of the Board on Judicial Standards address enforcement of the statute. Though current Rule 2(a) empowers the board to review a judge's compliance with the statute, noncompliance with the 90-day rule is not enumerated as a ground for discipline in Rule 4. Rule 4 permits discipline for violation of the Code of Judicial Conduct. Under the Code, Canon 3(A)(1) requires judges to decide cases "promptly." But the term "promptly" is not defined in the code. As a result, the 90-day rule has been used by the board as a guideline to assist in interpreting it. When a judge has delayed issuance of a decision without good cause but the sanction of withholding a judge's pay cannot be imposed because the judge issued the decision before the board could take action under the statute, the board may impose other forms of discipline utilizing the canon as its ground for discipline. This brings to light two things. First, the canon is unclear. Currently, the board is using the 90-day rule as a proxy for the term "promptly," but there are also numerous other deadlines with which a judge must comply. If the intent is for the canon to address those, it should say so. The committee is aware that the Supreme Court is currently reviewing the Code of Judicial Conduct, and recommends that the Court consider clarifying what is meant by deciding a case "promptly." Second, the board is unclear whether it can or should be issuing discipline based on violation of the 90-day rule. The committee recommends the Supreme Court address this issue when working with the Legislature to review and update the statute.

GROUNDS FOR DISCIPLINE

In reviewing the grounds for discipline in Rule 4, the committee encountered a more philosophical issue. The sixth ground for discipline enumerated in Rule 4 is "[c]onduct that constitutes a violation of the Code of Judicial Conduct or Professional Responsibility." Aside from the first ground for discipline – felony conviction – the remaining grounds for discipline are

vaguely stated and subject to interpretation (e.g., "habitual intemperance"). The committee noted that because of how the other grounds are stated, they would be hard for the board to define or enforce. Further, they raise a question about whether they are there to inform the canons or truly as separate grounds for discipline. Moreover, they are confusing for complainants. As a specific example, the third ground for discipline is "[i]ncompetence in the performance of judicial duties." The committee could see how this ground might be interpreted on the one hand as referring to mental competence and on the other hand as referring to lacking the qualifications to perform the judicial function. Some complainants have further interpreted the provision as rendering incorrect judicial decisions. The committee questioned whether the grounds listed in Rule 4(a)(2)-(5) are already contained within the Code of Judicial Conduct, and if not, whether they should be. The committee agreed that judges should be fully aware of the standards against which their conduct will be measured. For that reason, the code should be a complete set of standards, and it may be improper for additional standards to reside within the Rules of the Board on Judicial Standards in the form of grounds for discipline. The committee is aware that the Supreme Court is currently considering the report of the Committee on Rules of Judicial Conduct, and recommends that the Court review the canons and the grounds for discipline stated in Rule 4 in light of these comments.

BOARD FUNDING

During the course of discussion, it came to the committee's attention that the board has only recently become adequately funded. From 1999-2007, the board's rent increased by 25%, health insurance increased by 60%, the cost of electronic communication and consulting tripled, and the demands for public hearings increased. Due to these increases, the funds available to operate the board were halved. Board members assisted with the budget crisis by waiving their per diem and paying for their lunches during board meetings. The board's assistant experienced a five-year pay freeze, and the Executive Secretary's salary was not paid at the level required by statute. Because the board did not have funding for litigation, the board sought settlement as an alternative to continued investigation and/or issuing a Formal Complaint. In 2007, the board's general appropriation was increased, and a revolving fund was established for litigation.

It is imperative that the board continue to receive adequate funding. Inadequate funding severely limits the functioning of the board. During the past several years, inadequate funding has constrained the board from engaging in outreach activities to educate judges about improper conduct, purchasing software, destroying records in a timely fashion, and adequately investigating allegations of misconduct. Moreover, the board has been unable to cover cost-of-living increases for its employees. With regard to the salary of the Executive Secretary specifically, the committee discussed whether the current salary structure is adequate. By statute, the salary of the Executive Secretary is tied to that of an administrative law judge, which is 88.67% of the salary of a district court judge. In the past, the board has had difficulty attracting candidates for the position because of the salary. The pay may be unattractive to former judges because it is lower than their former salary, and it may be unattractive to experienced lawyers because it is low in comparison to the salary they could continue to earn in the private sector. Given the sensitive nature of the work, and the need for the board to attract candidates of the highest caliber, the committee agreed it would be more appropriate for the salary of this position to be equal to that of a district court judge. The committee discussed

several potential additional revenue sources for the board such as directing the attorney licensing fees for judges to the board, charging for pro hac vice admissions, and adding an additional dollar to the criminal surcharge and earmarking it for the board. The committee is not making a specific proposal at this time, but recommends that the Minnesota Supreme Court and Minnesota State Legislature investigate funding alternatives.

REQUEST FOR RECORDS ACCESS

In September 2007, the committee requested that the Supreme Court issue an order granting the committee access to a random sample of the board's files to aid the committee in learning about the functions and operations of the board, determining whether the current model for processing complaints is fair and effective, and identifying whether there are problems or issues not adequately addressed by the rules (see Appendix F). The committee renewed its request in November, 2007, suggesting a more limited scope of review and offering additional recommendations to address the confidentiality concerns of affected judges and complainants (see Appendix G). In December, the Supreme Court denied the request, stating in part, "[t]he principle of confidentiality has created clear expectations of privacy for judges, complainants, and other participants," and that the rules do not "contain a provision that allows the court to override the confidentiality requirement" (see Appendix H). The committee believes that it would be beneficial to conduct a periodic review of the board's records and proceedings. Similar reviews are conducted of the records of the Office of Lawyers Professional Responsibility. The committee therefore recommends that the Court promulgate new Rule 21, which would both permit the Court to appoint a committee for that purpose, and provide notice to the board, judges, complainants, and witnesses of the possibility that the files and proceedings will periodically be reviewed.

OTHER RECOMMENDATIONS

The committee has also recommended amendments to define more of the terms utilized in the rules, require the board to conduct an annual performance review of the executive secretary, require the board to maintain a code of ethics, clarify that the judge can access the file relative to a complaint at any stage of the proceedings, limit issuance of subpoenas to the formal investigation stage, and expand the discovery rule to allow the presider of the hearing panel to authorize interrogatories on a case-by-case basis.

EDUCATING JUDGES

Several of the committee members were current or former members of the board. As such, they brought a real-world perspective to the work of the committee. One of the issues these members noted was that the board is in a unique position to recognize themes of behavior and to educate judges about how to recognize and correct that behavior. Board members also participate in judicial selection process, and have an opportunity in that regard to emphasize the traits they have found make a successful judge, or to identify training needs that would help high quality candidates succeed on the job (e.g., a candidate who has been a highly successful lawyer but has never managed people may need some management training to learn how to successfully

work with court staff). This education role is an essential function of the board. The committee recommends that the Supreme Court continue to support the board in this important work.

Respectfully Submitted,

ADVISORY COMMITTEE ON RULES
OF THE BOARD ON JUDICIAL STANDARDS

MINORITY POSITION

It was an honor to have been a part of the Supreme Court Advisory Committee on Rules of the Board on Judicial Standards. I voted for the report and believe, with one exception, the suggested changes are welcome and will allow the board to better serve the public, judges and the entire judicial system.

I have concerns about the recommendation to disclose the names of board members who participate in actions before the board. It is unclear to me what problem this remedy seeks to correct and feel the change could spawn additional questions and problems.

The board acts and speaks as one entity, not an amalgam of factions. I believe this adds credibility to its actions. The public members are not out to "get" people and the judge members are not there to "protect" the judiciary. Instead, all members bring their personal background, philosophy and career experience to the table. The result is a full, open discussion on all matters before the board. I believe this was the intent in founding the board and feel it enables the best outcome for all concerned. The board acts and everyone knows who serves on the board. That should suffice.

It is unclear how the public or judiciary are better served knowing a certain judge, lawyer or public member did or did not participate in a given action. This change breeds more questions and concerns than it solves. To mention just one: Isn't it likely someone will question the legitimacy of the board's action because of conclusions drawn about who participated in the action? For example, will Judge Smith, who is receiving a sanction, make certain inferences because two judge members (who may have been on vacation) did not participate in the action? More important, isn't it conceivable Smith would be <u>less</u> likely to accept a sanction (or, more important, change his errant behavior) unless all judge members participated? Where does all this confusion lead?

The most important question is, will this change enhance confidence in the board or the judiciary? I don't believe so. In fact, I believe it will be highly corrosive to the process. I hope the Supreme Court will be skeptical of this recommended change.

Respectfully Submitted,

PATRICK D. SEXTON

Position Joined By,

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PROPOSED AMENDMENTS TO THE RULES OF THE BOARD ON JUDICIAL STANDARDS

The Supreme Court Advisory Committee on Rules of the Board on Judicial Standards recommends that the following amendments be made in the Rules of the Board on Judicial Standards. In the proposed amendments, except as otherwise indicated, deletions are indicated by a line drawn through the words and additions by a line drawn under the words.

DEFINITIONS

"**Censure**" is a formal public sanction by the Supreme Court based on a finding the judge has committed serious misconduct.

"**Complaint**" is any communication, oral or written, made by judges, lawyers, court personnel or any member of the general public regarding the conduct of a judge.

"**Deferred Disposition Agreement**" is an agreement between the judge and the board or hearing panel for the judge to undergo treatment, participate in education programs, or take other corrective action, based upon misconduct or disability that can be addressed through treatment or a rehabilitation program.

"**Disability**" is a physical or mental condition of a judge that significantly interferes with the capacity of the judge to perform judicial duties, including, but not limited to, impairment due in whole or in part from habitual or excessive use of intoxicants, drugs, or controlled substances. A disability may be permanent or temporary.

"**Evaluation**" is a prompt and discreet inquiry by the executive secretary into the facts and circumstances of any complaint which alleges conduct listed in Rule 4(a).

"**Formal Complaint**" is a complaint upon which the board has determined to conduct a public hearing.

"**Formal Statement of Disability Proceeding**" is a statement that the board has determined to conduct a public hearing to determine the appropriate action with regard to a judge alleged to have a disability.

"**Investigation**" is a full inquiry by the executive secretary, with the authorization of the board, into the facts and circumstances of any complaint which alleges conduct listed in Rule 4(a).

"**Judge**" is any judge, including full-time, part-time, and retired judges, judicial officer, referee, magistrate, or other hearing officer employed in the judicial branch of the state of Minnesota, any judge of the Minnesota Tax Court, or any judge of the Workers' Compensation Court of Appeals.

"**Letter of Caution**" is a nondisciplinary letter that advises the judge regarding future conduct.

"**Private Admonition**" is a nonpublic sanction imposed by the board for misconduct of an isolated and non-serious nature.

"**Public Reprimand**" is a public sanction imposed by the board or hearing panel based on a finding that the judge has committed serious misconduct.

"**Reasonable Cause**" is a belief in the existence of facts warranting discipline or a finding of disability.

~~"**Statement of Charges**" is a complaint upon which the board has determined there is sufficient cause to proceed.~~

~~"**Formal Complaint**" is complaint upon which the board has determined to conduct a formal hearing.~~

RULE 1. ORGANIZATION OF BOARD

(a) Appointment of Members. The Board on Judicial Standards shall consist of one judge of Court of Appeals, three judges of district court, two lawyers who have practiced law in the state for at least ten years and four resident citizens of Minnesota who are not judges, retired judges or lawyers. The executive secretary, who shall be an attorney licensed to practice law in Minnesota, with a minimum of fifteen years' experience in the practice of law, including any service as a judge, shall be appointed by the board. All members shall be appointed by the governor with the advice and consent of the senate except that senate confirmation shall not be required for judicial members. ~~Minn. St. § 490.15.~~

(b) Term of Office.

(1) The term of each member shall be four years.

(2) No member shall serve more than two full four-year terms or their equivalent, not to exceed eight years.

(c) Vacancy.

(1) A vacancy on the board shall be deemed to occur:

(i) When a member retires from the board; or

(ii) When a judge who is a member of the board ceases to hold the judicial office held at the time of selection; or

(iii) When a lawyer ceases to be in good standing to practice law in the courts of this state or is appointed or elected to a judicial office; or

(iv) When a lay member becomes a lawyer; or

(v) When a member is no longer a resident citizen.

(2) Vacancies shall be filled by selection of a successor in the same manner as required

for the selection of the predecessor in office. A member selected to fill a vacancy shall hold office for the unexpired term of the predecessor. All vacancies on the board shall be filled within 90 days after the vacancy occurs.

(3) Members of the board may retire therefrom by submitting their resignation to the board, which shall certify the vacancy to the governor.

(d) Duties and Responsibilities of Executive Secretary. The executive secretary shall have duties and responsibilities prescribed by the board, including the authority to:

(1) Receive complaints and allegations as to misconduct or disability;
(2) Make preliminary evaluations;
(3) Conduct investigations of complaints as directed by the board;
(4) Recommend dispositions;
(5) Maintain the board's records;
(6) Maintain statistics concerning the operation of the board and make them available to the board and to the Supreme Court;
(7) Prepare the board's budget for approval by the board and administer its funds;
(8) Employ and supervise other members of the board's staff;
(9) Prepare an annual report of the board's activities for presentation to the board, to the Supreme Court, and to the public;
(10) Employ, with the approval of the board, special counsel, private investigators or other experts as necessary to investigate and process matters before the board and before the Supreme Court. The use of the attorney general's staff prosecutors or law enforcement officers for this purpose shall not be allowed. The use of the director and staff of the Office of Lawyers Professional Responsibility for this purpose shall be allowed if the matter involves conduct of a judge, other than a Supreme Court Justice, that occurred prior to the judge assuming judicial office. Individuals employed or providing assistance under this section shall be deemed to be counsel to the Board on Judicial Standards for the purposes of these rules.

(e) Performance Review of Executive Secretary. The board shall annually conduct a performance review of the executive secretary.

(ef) Quorum and Chairperson.

(1) A quorum for the transaction of business by the board shall be six members of the board.
(2) The board shall elect from its members a chairperson and vice-chairperson, each of whom shall serve a term of two years. The vice-chairperson shall act as chairperson in the absence of the chairperson.

(fg) Meetings of the Board. Meetings of the board shall be held at the call of the chairperson, the vice-chairperson, the executive secretary or the written request of three members of the board.

(gh) Annual Report. At least once a year the board shall prepare a report summarizing

its activities during the preceding year. One copy of this report shall be filed with the Supreme Court.

~~(h)~~ (i) Expenses of the Board and Staff.

(1) The expenses of the board shall be paid from appropriations of funds to the Board on Judicial Standards.

(2) Members of the board shall be compensated for their services as provided by law.

(3) In addition to the executive secretary, the board may appoint other employees to perform such duties as it shall direct, subject to the availability of funds under its budget.

(j) Code of Ethics. The board shall maintain a Code of Ethics setting forth the ethical standards expected of board members in the performance of the board's responsibilities.

ADVISORY COMMITTEE COMMENT--1999 AMENDMENT

Rule 1(d)(10) has been modified to allow the use of the director and staff of the Office of Lawyers Professional Responsibility to provide investigative and support services in situations involving conduct that occurred prior to a judge assuming judicial office. Related changes grant the Lawyers Professional Responsibility Board jurisdiction to consider whether such conduct warrants lawyer discipline. R.Bd.Jud.Std. 2; R.L.Prof.Resp. 6Z(a). It is contemplated that complaints about the conduct of a judge occurring prior to the judge assuming judicial office will be investigated in the first instance by the Office of Lawyers Professional Responsibility [R.Bd.Jud.Std. 6Z(b); R.L.Prof.Resp. 6Z(b)(2)], and the results would be disclosed to the Board on Judicial Standards. R.Bd.Jud.Std. 5(a)(4); R.L.Prof.Resp. 20(a)(10). This allows for efficient and effective use of investigative resources by both disciplinary boards. Related changes also authorize the use of the hearing record, findings, and recommendations of the lawyer disciplinary process in the judicial disciplinary process. R.Bd.Jud.Std. 6Z(d); R.L.Prof.Resp. 6Z(b)(4).

Rule 1(d)(10) prohibits the use of the staff of the Office of Lawyers Professional Responsibility when the pre-bench conduct at issue involves a Supreme Court Justice because the office's director and staff are appointed and compensated by the Court. If such a case were to arise, it is contemplated that the Office of Lawyers Professional Responsibility would follow existing conflict procedures, which include assigning a former attorney or former board member to review and follow up on patently frivolous complaints and hiring outside counsel and investigators to handle other complaints. The prohibition against the use of office staff does not prohibit communication of confidential information between the two boards regarding matters involving the conduct of a justice occurring prior to assumption of judicial office.

Modifications to Rule 1(d)(10) also clarify that individuals employed or providing assistance to the executive secretary and the board are considered counsel to the board for purposes of these rules. This ensures, for example, that the immunity and privilege provisions under Rule 3 and the confidentiality and work product provisions under Rule 5 apply to these individuals when they are assisting the executive secretary and the board.

RULE 2. JURISDICTION AND POWERS OF BOARD

(a) Powers ~~in General~~of the Board.

(1) *Disposition of Complaints.* The board shall have the power to receive complaints, investigate, conduct hearings, make certain summary dispositions, and make recommendations to the Supreme Court concerning:

(~~1~~i) Allegations of judicial misconduct;
(~~2~~ii) Allegations of physical or mental disability of judges;
(~~3~~iii) Matters of voluntary retirement for disability; and
(4iv) Review of a judge's compliance with Minn.St. § 546.27.

(2) *Advisory Opinions.* The board may issue advisory opinions on proper judicial conduct with respect to the provisions of the Code of Judicial Conduct. An advisory opinion may be requested by a judge or a candidate for judicial office. A request for an advisory opinion shall relate to prospective conduct only, and shall be submitted in writing and contain a complete statement of all facts pertaining to the intended conduct and a clear, concise question of judicial ethics. The board shall issue a written opinion within 30 days after receipt of the written request, unless the time period is extended by the board. The fact that the judge or judicial candidate requested and relied on an advisory opinion shall be taken into account in any subsequent disciplinary proceedings. The advisory opinion shall not be binding on the hearing panel or the Supreme Court in the exercise of their judicial-discipline responsibilities.

(b) Jurisdiction Over ~~Full-Time and Part-Time~~ Judges. The board shall have jurisdiction over ~~the conduct of~~allegations of misconduct and disability for all judges~~, including full-time judges, retired judges subject to assignment, and part-time judges such as conciliation court referees~~.

(c) Conduct Prior to Assuming Judicial Office. ~~This~~The board's jurisdiction shall include conduct that occurred prior to a judge assuming judicial office. ~~The board shall have exclusive jurisdiction in matters involving conduct occurring in a judicial capacity.~~ The Office of Lawyers Professional Responsibility ~~Board~~ shall have jurisdiction to consider whether discipline as a lawyer is warranted in matters involving conduct of any judge occurring prior to the assumption of judicial office~~ and conduct of a part-time judge, such as a referee of conciliation court, not occurring in a judicial capacity~~.

(ed) Jurisdiction Over Former Judge. The board shall have continuing jurisdiction over an inquiry, investigation, or Formal Complaint commenced before a judge left judicial office provided the conduct at issue occurred while the judge was in judicial office and the conduct at issue occurred in the judge's judicial capacity. The board shall also have jurisdiction over matters of a disability retirement over a retired judge. The board may at any time dismiss a matter involving a former judge if the board determines that pursuing the matter further is not a prudent use of the board's resources. The Office of Lawyers Professional Responsibility ~~Board~~ shall have jurisdiction over a lawyer who is no longer a judge to consider whether discipline as a lawyer is warranted with reference to allegedly unethical conduct that occurred during~~ or prior to~~

the time when the lawyer held judicial office~~, provided such conduct has not been the subject of judicial disciplinary proceedings as to which a final determination has been made by the Supreme Court~~. The board shall notify the Office of Lawyers Professional Responsibility if a judge leaves judicial office while an inquiry, investigation, or Formal Complaint is pending.

(~~d~~e) Subpoena and Depositions.

(1) *Depositions Limited.* Depositions shall not be allowed, provided that, for good cause shown, a deposition may be taken of a witness living outside the state or physically unable to attend the hearing.

(2) *Subpoenas for Investigation.* During the ~~evaluation and~~ investigative stage of a proceeding, prior to a finding of ~~sufficient~~reasonable cause to proceed ~~pursuant to Rule 6(d)~~, and subject to the limitations of Rule 2(~~d~~e)(1):

(i) Upon resolution of the board, the executive secretary may make application for the issuance of a subpoena compelling any person, including a judge, to attend and give testimony, and to produce documents, books, accounts and other records. Such subpoena shall issue upon a showing that the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(ii) Failure or refusal of a judge who is the subject of information to cooperate or the intentional misrepresentation of a material fact by the judge shall constitute conduct prejudicial to the administration of justice and may ~~be sufficient~~provide reasonable cause for the board to proceed under Rule 2(~~d~~e)(3).

(3) *Subpoenas for Hearing.* At all other stages of the proceeding following a finding of ~~sufficient~~reasonable cause to proceed ~~pursuant to Rule 6(d)~~, and subject to the limitations of Rule 2(~~d~~e)(1), both the board and the judge being investigated shall be entitled to compel, by subpoena, attendance and testimony of witnesses, including the judge as a witness, and the inspection of documents, books, accounts and other records.

(4) *Issuing Subpoenas.* The District Court of Ramsey County shall issue subpoenas.

(5) *Motions.* Prior to the appointment of a ~~factfinding~~hearing panel pursuant to Rule ~~10(a)~~8(b), the District Court of Ramsey County shall have jurisdiction over motions arising from Rule 2(~~d~~e) requests. Following the appointment of a ~~factfinding~~hearing panel, the presider of the ~~factfinding~~ panel before whom the matter is pending shall have jurisdiction over motions arising from Rule 2(~~d~~e) requests and shall have all the powers of a district court judge. Any resulting decision or order of the presider of the ~~factfinding~~hearing panel or the District Court of Ramsey County may not be appealed before entry of the final order in the disciplinary proceeding. The judge shall be denominated by number or randomly selected initials in any District Court proceedings.

(e~~f~~) Impeachment. Nothing in these rules shall affect the impeachment of judges under the Minnesota Constitution, Art. 8.

ADVISORY COMMITTEE COMMENT--1999 AMENDMENT

~~*Rule 2(a) has been amended to recognize that the board may make certain summary dispositions. These dispositions include proposed public reprimands under Rule 6(d)(1)(ii), which are subject to a judge's right to demand a formal hearing before the reprimand is made public, and nonpublic warnings, conditions, counseling, treatment, and assistance directed by the board under Rule 6(f).*~~

Rule 2(b) has been modified to permit the Lawyers Professional Responsibility Board to also exercise jurisdiction to consider whether discipline as a lawyer is warranted in matters involving conduct of any judge occurring prior to the assumption of judicial office. As set forth in the definition section of these rules, the term "judge" includes any judge, judicial officer, referee or other hearing officer employed in the judicial branch, and any judge of the Minnesota Tax Court or Worker's Compensation Court of Appeals. See Minn. Stat. §§ 490.15-.18; 175A.01, subd. 4; 271.01 (1998). The procedure to be followed in situations involving pre-bench conduct is set forth in rule 6Z of these rules.

RULE 3. IMMUNITY; PRIVILEGE

Information submitted to the board or its staff and testimony given in the proceedings under these rules shall be absolutely privileged, and no civil action predicated thereon may be instituted against the complainant or witness, or their counsel. Members of the board, referees, board counsel and staff shall be absolutely immune from suit for all conduct in the course of their official duties.

RULE 4. GROUNDS FOR DISCIPLINE

(a) Grounds for Discipline Shall Include:

(1) Conviction of a crime punishable as a felony under state or federal law or any crime involving moral turpitude;

(2) A persistent failure to perform judicial duties;

(3) ~~Incompetence~~Pattern of incompetence in the performance of judicial duties;

(4) Habitual intemperance;

(5) Conduct prejudicial to the administration of justice that brings the judicial office into disrepute, including, but not limited to, discrimination against or harassment of persons on the basis of race, color, creed, religion, national origin, sex, marital status, sexual preference, disability or age.

(6) Conduct that constitutes a violation of the Code of Judicial Conduct or Professional Responsibility.

(b) Disposition of Criminal Charges. A conviction, acquittal or other disposition of any criminal charge filed against a judge shall not preclude action by the board with respect to the conduct upon which the charge was based.

(c) Proceedings Not Substitute for Appeal. In the absence of fraud, corrupt motive or

bad faith, the board shall not take action against a judge for making findings of fact, reaching a legal conclusion or applying the law as understood by the judge. Claims of error shall be left to the appellate process.

ADVISORY COMMITTEE COMMENT--2008 AMENDMENT

Retaliatory behavior by the judge against a complainant may be grounds for discipline under the Code of Judicial Conduct or Professional Responsibility. See, e.g., Inquiry into the Conduct of Murphy, 737 N.W.2d 355 (Minn. 2007).

RULE 5. CONFIDENTIALITY

(a) Before Formal Complaint and Response. Except as otherwise provided in this rule, all proceedings shall be confidential until the Formal Complaint and response, if any, have been filed with the Supreme Court pursuant to Rule 8. The board shall establish procedures for enforcing the confidentiality provided by this rule.

~~(1) Upon determination that there is insufficient cause to proceed, the complainant, if any, shall be promptly notified and given a brief explanation of the board's action. The complainant shall also be promptly notified of any disposition pursuant to Rule 6(f).~~

(~~2~~1) If at any time the board ~~takes action as may be authorized pursuant to Rule 6(d)(1)(ii)~~issues a public reprimand, such action shall be a matter of public record.

(~~3~~2) ~~Any action taken by the board pursuant to Rule 6(f)~~If the board issues a dismissal with a letter of caution or enters into a deferred disposition agreement, this action may be disclosed to the chief justice, chief judge and/or district administrator of the judicial district in which the judge sits. Such disclosure is at the discretion of the board and shall be for the purpose of monitoring future conduct of the judge and for assistance to the judge in modifying the judge's conduct. To the extent that any information is disclosed by the board pursuant to this provision, the chief justice, chief judge and/or district administrator shall maintain the confidentiality of the information in accordance with Rule 5.

(43) Information may be disclosed between the Board on Judicial Standards or executive secretary and the Lawyers Professional Responsibility Board or the director in furtherance of their duties to investigate and consider conduct that occurred prior to a judge assuming judicial office.

(b) After Formal Complaint and Response. Upon the filing of the Formal Complaint and written response, if any, with the Supreme Court, the proceedings become public, but the files of the board, other than the Formal Complaint and the written response thereto, shall remain confidential unless and until any documents, statements, depositions or other evidence in the files of the board are introduced or used in a public hearing as provided in Rule 10.

(c) Notice to Complainant. The board shall promptly notify the complainant, if any, of the board's action and give a brief explanation of the action. The notice shall disclose the names

of the board members who participated in the action. If the board's action is issuance of a Formal Complaint, the board shall notify the complainant of the issuance of the Formal Complaint, the hearing panel's action, and the action, if any, of the Supreme Court.

(ed) Work Product. The work product of the executive secretary and board counsel, and the records of the board's deliberations, shall not be disclosed.

(de) Public Statements by Board.

(1) In any case in which the subject matter becomes public through independent sources or through a waiver of confidentiality by the judge, the board may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the judge to a fair hearing without prejudgment and to state that the judge denies the allegations. The statement shall be first submitted to the judge involved for comments and criticisms prior to its release, but the board in its discretion may release the statement as originally prepared.

(2) If the inquiry was initiated as a result of notoriety or because of conduct that is a matter of public record, information concerning the lack of cause to proceed may be released by the board. If the inquiry was initiated during an election, the board may issue a public statement as deemed appropriate pursuant to Rule 6(e).

(3) The board may make such disclosures as it deems appropriate whenever the board has determined that there is a need to notify another person or agency in order to protect the public or the administration of justice.

(f) Disclosure for Application to the Governor for Retirement. The board may disclose to the governor information about the existence, status, and nature of pending complaints regarding judges who have applied to the governor for disability retirement as provided in Rule 20.

(eg) Disclosure for Judicial Selection, Appointment, Election or Assignment. When any state or federal agency seeks material in connection with the selection or appointment of judges or the assignment of a retired judge to judicial duties, the board may release information from its files only: (1) if the judge in question agrees to such dissemination; and (2) if the file reflects some action of the board pursuant to ~~Rule 6(d),~~ Rule 6(f) ~~or Rule 7~~. If the board action was taken on or after January 1, 1996, such information may also be released if a judge is involved in a contested election, subject to the same restrictions.

(gh) Disclosure to Judge. The judge who is the subject of a complaint shall, upon request, have access to the file relative to the complaint at any stage of the proceedings, including witness statements and notes of witness interviews. The work product of the executive secretary and board counsel, including notes, and the records of the board's and hearing panel's deliberations shall not be required to be disclosed.

(fi) Waiver of Confidentiality. A respondent judge may waive confidentiality at any time during the proceedings.

ADVISORY COMMITTEE COMMENT--1999 AMENDMENT

Rule 5(a) has been modified by the addition of clause (4) to permit the exchange of information between the two disciplinary boards and their staff in situations involving conduct of a judge that occurred prior to the judge assuming judicial office. See also R.L. Prof.Resp. 20(a)(10). Both the Board on Judicial Standards and the Lawyers Professional Responsibility Board have jurisdiction in such cases. R.Bd.Jud.Std. 2(b); R.L.Prof.Resp. 6Z.

RULE 6. ~~PROCEDURE PRIOR TO SUFFICIENT CAUSE DETERMINATION~~SCREENING AND INVESTIGATION

(a) Initiation of Inquiry. An inquiry may be initiated as follows:

(1) An inquiry relating to conduct of a judge may be initiated upon a complaint.
(2) The board may on its own motion make an inquiry into the conduct or physical or mental condition of a judge.
(3) Upon request of the Chief Justice of the Supreme Court, the board shall make an inquiry into the conduct or physical or mental condition of a judge.

(b) Screening. The executive secretary shall review the complaint or sources of information resulting in the initiation of an inquiry. If the information would not constitute misconduct or disability if it was true, the executive secretary shall dismiss the complaint, subject to review and approval by a board member as assigned by the chair, or, if appropriate, refer the matter to another agency or court. If the information raises allegations that would constitute judicial misconduct or disability if true, the executive secretary shall conduct a preliminary evaluation.

(~~b~~c) Preliminary Evaluation. Upon ~~receipt of a complaint~~initiation of an inquiry as to conduct that might constitute grounds for discipline, the executive secretary shall conduct a prompt, discreet and confidential evaluation. The results of all evaluations shall be routinely submitted to the board.

(~~c~~d) Investigation; ~~Discretionary~~ Notice.

(1) Upon review of the preliminary evaluation, or on its own motion, the board may, by resolution~~, authorize an investigation.~~:

(i) stay proceedings pending action by another agency or court;
(ii) dismiss the complaint; or
(iii) authorize an investigation.

(2) ~~Notice that~~Within ten (10) business days after an investigation has been authorized by the board, the executive secretary shall give the following notice ~~may be given~~ to the judge whose conduct ~~or physical or mental condition~~ is being investigated:

(i) a specific statement of the allegations and possible violations of canons being investigated, including notice that the investigation can be expanded if appropriate;

(ii) the judge's duty to respond pursuant to Rule 6(d)(5);

(iii) the judge's opportunity to appear before the board or panel of the board pursuant to Rule 6(d)(6); and

(iv) the name of the complainant, unless the board determines there is good cause to withhold that information.

Except as provided in clause (3), the executive secretary shall not commence a formal investigation until such notice is sent to the judge.

(3) The board may defer notice for extraordinary and specific reasons, but when notice is deferred, the executive secretary shall give notice to the judge before making a recommendation as to discipline.

(4) Notice shall be sent immediately upon request of the judge whose conduct or physical or mental condition is the subject of the complaint if the complaint has been made public.

(5) Upon request of the executive secretary, the judge shall file a written response within thirty (30) days after service of the notice under Rule 6(d)(2).

(6) Before the board determines its disposition of the complaint, either the board or the judge may request that the judge appear before the board or a panel of the board to respond to questions. The appearance shall be granted. If the board requests the judge's appearance, the executive secretary shall give the judge 20 days notice and the testimony shall be sworn.

(e) Investigation of Complaints Filed During an Election Campaign. The board may conduct an expedited investigation into complaints against judges who are candidates for judicial office. If after investigation the board determines the complaint has no merit, the board may dismiss the complaint and issue an appropriate public statement.

(~~d~~f) ~~Sufficient Cause Determination~~Disposition After Investigation.

~~(1) The board shall promptly consider the results of the investigation. If the board determines that there is sufficient cause to proceed, it shall either:~~

~~(i) comply with Rule 7, or where authorized under rule 6Z(c), proceed directly to Rule 8; or~~

~~(ii) if the judge's conduct was unacceptable under one of the grounds for judicial discipline that does not merit formal proceedings or further discipline by the Supreme Court, issue a public reprimand. Prior to the issuance of a public reprimand pursuant to this Rule 6(d)(1)(ii), the judge shall be served with a copy of the proposed reprimand and a notice setting~~

~~forth the time within which these rules require the judge to either submit comments and criticisms or to demand a formal hearing as provided in Rule 8. Within 20 days of service of the proposed reprimand, the board shall be served with either a written demand for a formal hearing as provided in Rule 8, or the written comments and criticisms of the judge regarding the proposed reprimand. If a timely demand for a formal hearing is made, the board shall comply with Rule 8. If no timely demand for a hearing is made, the board may consider the comments and criticisms, if any, but may in its discretion release the reprimand as originally prepared.~~

(1) Upon conclusion of an investigation or determination by another agency or court, the executive secretary may recommend disposition to the board.

(2) The board shall review the results of the investigation or determination by another agency or court and the recommendations of the executive secretary and determine if there is reasonable cause to proceed.

(3) Upon determination that there is not reasonable cause to proceed, the board shall dismiss the complaint. Upon dismissal, the board may issue a letter of caution that addresses the judge's conduct.

(4) If the board finds there is reasonable cause to believe the judge committed misconduct, it may:

(i) enter into a deferred disposition agreement for a period of time, and the agreement may specify the disposition upon completion;

(ii) if the misconduct appears to be of an isolated and non-serious nature, issue a private admonition, which may include conditions;

(iii) issue a public reprimand, which may include conditions; or

(iv) issue a Formal Complaint;

Prior to issuance of a public reprimand, the board shall serve the judge with a copy of the proposed reprimand and a notice setting forth the time within which these rules require the judge to either submit comments and criticisms or to demand a formal hearing as provided in Rule 8. Within 20 days of service of the proposed reprimand, the board shall be served with either a written demand for a formal hearing as provided in Rule 8, or the written comments and criticisms of the judge regarding the proposed reprimand. If a timely demand for a formal hearing is made, the board shall comply with Rule 8. If no timely demand for a hearing is made, the board may consider the comments and criticisms, if any, but may in its discretion release the reprimand as originally prepared.

(~~2~~5) A finding of ~~sufficient~~reasonable cause shall require the concurrence of a majority of the full board.

(6) The board shall notify the judge of its action and shall disclose the names of the board members who participated in the action.

~~**(c) Insufficient Cause to Proceed**~~

~~(1) Upon determination that there is insufficient cause to proceed, the board shall promptly comply with Rule 5(a)(1). If informed of the proceeding, the judge shall also be promptly notified of its termination and the file shall be closed.~~

~~(2) A closed file may not be referred to by the board in subsequent proceedings unless the board has proceeded according to Rule 6(d) or (f), or Rule 7.~~

~~**(f) Dispositions in Lieu of Further Proceedings.** Even though the board does not find sufficient cause to proceed pursuant to Rule 7, it may make any of the following dispositions, unless the underlying conduct is part of a pattern involving the same or similar conduct:~~

~~(1) The board may warn the judge that the conduct may be cause for discipline.~~

~~(2) The board may impose reasonable conditions on a judge's conduct.~~

~~(3) The board may direct professional counseling, treatment or assistance for the judge.~~

~~**(g) Objection to Dispositions.** Any judge objecting to disposition of a complaint pursuant to Rule 6(f) may demand a full hearing before a factfinder as provided in Rule 8.~~

(~~h~~g) Representation by Counsel. A judge may be represented by counsel, at the judge's expense, at any stage of the proceedings under these rules.

ADVISORY COMMITTEE COMMENT--1999 AMENDMENT

~~*The change in Rule 6(d)(1)(i) recognizes that the Board on Judicial Standards may proceed directly to issuance of a formal complaint under Rule 8 when there has been a related public proceeding before the Lawyers Professional Responsibility Board involving conduct of a judge that occurred prior to the judge assuming judicial office. In these circumstances the procedure under rule 7 may only serve to delay the disciplinary process.*~~

~~*Modifications to Rule 6(d)(1)(ii) allow the board to submit a proposed public reprimand to the judge for conduct that is unacceptable but not so serious as to warrant further discipline, e.g., a censure, by the Supreme Court. Disciplinary bodies in other jurisdictions have similar authority. See, e.g., Rule 6(g)(1), Rules of Procedure for the Arizona Commission on Judicial Conduct; Rules of the Georgia Judicial Qualifications Commission, Definition (e). The change is intended to provide the board with guidance regarding when it is appropriate to proceed directly to a proposed reprimand (which is subject to a judge's right to demand a formal hearing before the reprimand is made public) in lieu of formal charges under Rules 7 and 8.*~~

ADVISORY COMMITTEE COMMENT--2008 AMENDMENT

Rule 6(d)(1)(i) allows the board to stay proceedings pending action by another agency or court. Such proceedings include criminal prosecution, civil litigation, and administrative action by regulatory agencies.

RULE 6Z. PROCEDURE FOR CONDUCT OCCURRING PRIOR TO ASSUMPTION OF JUDICIAL OFFICE

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

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

(c) Authority of Board on Judicial Standards to Proceed Directly to Public Charges. If probable cause has been determined under Rule 9(i)(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~~reasonable cause under Rule 6 of the Rules of the Board on Judicial Standards, proceed directly to the issuance of a ~~formal complaint~~Formal Complaint under Rule 8 of those rules.

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

ADVISORY COMMITTEE COMMENT--1999 AMENDMENT

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

The provisions of Rule 6Z(a)-(d) are repeated in R.L.Prof.Resp. 6Z(b)(1)-(4). The committee felt that repetition of the significant procedural provisions was more convenient and appropriate than a cross-reference.

Rule 6Z(a) requires the staff of the Lawyers Professional Responsibility Board and the Judicial Standards Board to notify each other about complaints concerning conduct by a judge occurring before the judge assumed judicial office. Notice is not required if all proceedings

relating to the inquiry, investigation or complaint have been resolved before the judge assumed judicial office.

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

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

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

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

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

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

Under rule 6Z(d) it is contemplated that the hearing record and the findings and conclusions of the lawyer disciplinary process will be the first evidence introduced in the rule 10 judicial disciplinary hearing. Counsel for the board and the judge may be permitted to introduce additional evidence relevant to alleged Code of Judicial Conduct violations at the hearing. Counsel must be aware that there may be situations in which the introduction of additional evidence will not be permitted. See, e.g., In re Gillard, 260 N.W.2d 562, 564 (Minn. 1977) (after review of hearing record and findings and conclusions from lawyer disciplinary process,

Supreme Court ruled that findings would not be subject to collateral attack in the related judicial disciplinary proceeding and that additional evidence may be introduced only as a result of a stipulation or order of the fact finder); In re Gillard, 271 N.W.2d 785, 809 (Minn. 1978) (upholding removal and disbarment where Board on Judicial Standards as factfinder refused to consider additional testimony but allowed filing of deposition and exhibits and made alternative findings based on those filings). Although the rules do not expressly provide for a pre-hearing conference, it is contemplated that admissibility issues will be resolved by the presider of the fact finding panel sufficiently in advance of the hearing to allow the parties adequate time to prepare for the hearing.

~~**RULE 7. PROCEDURE WHERE SUFFICIENT CAUSE FOUND**~~

~~**(a) Statement of Charges.**~~

~~(1) If no reprimand is issued under Rule 6(d)(1)(ii) after a finding of sufficient cause to proceed, the executive secretary shall prepare a Statement of Charges against the judge setting forth the factual allegations and the time within which these rules require the judge to serve a written response. Where more than one act of misconduct is alleged, each shall be clearly set forth.~~

~~(2) The judge shall be served promptly with a copy of the Statement of Charges. Service shall be accomplished in accordance with the Rules of Civil Procedure.~~

~~(3) The judge shall serve a written response on the board within 20 days of service of the Statement of Charges. A personal appearance before the board shall be permitted in lieu of or in addition to a written response. In the event that the judge elects to appear personally, a verbatim record of the proceedings shall be made.~~

~~**(b) Termination after Response.** The board may terminate the proceeding and dismiss the Statement of Charges following the response by the judge, or at any time thereafter, and shall in that event comply with Rule 5(a)(1) and give notice to the judge that it has found insufficient cause to proceed.~~

~~**(c) Quorum.** If the board elects to proceed as authorized in Rule 8, such action must be by concurrence of a majority of the full board.~~

~~**ADVISORY COMMITTEE COMMENT—1999 AMENDMENT**~~

~~*The cross reference to Rule 6(d)(1)(ii) recognizes that in certain situations the board may proceed directly to a proposed reprimand (which is subject to a judge's right to demand a formal hearing before the reprimand is made public) in lieu of formal charges under Rules 7 and 8.*~~

RULE 7. PRIVATE ADMONITION REVIEW

(a) **Private Admonition Review Committee.** The executive secretary shall create a list of former board members who agree to serve on a private admonition review committee. The

chair shall randomly appoint a three-member committee from the list upon request as provided in paragraph (b). The committee shall be composed of one judge, one lawyer, and one public member.

(b) Review. A judge may seek confidential review of a private admonition by filing a request for review with the board within 14 days after actual receipt of notice of issuance of the admonition. The committee shall conduct a hearing. The committee may, by clear and convincing evidence, affirm issuance of the admonition or direct the board to dismiss the complaint. If directed to dismiss, the board may issue a letter of caution that addresses the judge's conduct.

(c) Appeal. The board or judge may appeal the committee's disposition to the Supreme Court within 30 days. Review shall proceed under Rule 14.

RULE 8. FORMAL COMPLAINT AND NOTICE

(a) Formal Complaint.

(1) ~~Promptly following the board's determination pursuant to Rule 7(c), or when required pursuant to Rule 6(d)(1)(ii) or Rule 16(a), the board shall issue a~~The Formal Complaint shall set~~ting~~ forth the charges against the judge, the factual allegations and the time within which these rules require the judge to serve a written response. Where more than one act of misconduct is alleged, each shall be clearly set forth.

(2) The judge shall be served promptly with a copy of the Formal Complaint. Service shall be accomplished in accordance with the Rules of Civil Procedure.

(3) The judge shall serve a written response on the board within 20 days ~~of~~after service of the Formal Complaint. The judge may request a personal appearance before the board in addition to providing a written response. The appearance shall be granted.

(4) The executive secretary~~, upon receiving the written response of the judge, or if none has been received, within 25 days of service of the Formal Complaint,~~ shall file the Formal Complaint and the written response, if any, with the Supreme Court, within 30 days of service of the Formal Complaint unless the matter is resolved. The time for filing the complaint may be extended by agreement of the board and the judge.

(b) Hearing Panel. The public hearing on the Formal Complaint shall be conducted before a three-member hearing panel. Members of the panel shall be appointed by the Chief Justice of the Supreme Court within 10 days of the filing of the Formal Complaint with the Supreme Court. The panel shall consist of one judge or retired judge in good standing, one lawyer, and one member of the public. Whenever possible, the public member shall be a former member of the board. The judge or retired judge member shall be the presider, and shall have the powers of a judge of the district court for these proceedings.

(~~b~~c) Notice of Hearing.

(1) Upon the filing of Formal Complaint and Response, if any, with the Supreme Court, the ~~board~~hearing panel shall schedule a public hearing. The date shall be selected to afford the judge ample time to prepare for the hearing, but shall not be later than 90 days after the filing of the Formal Complaint with the Supreme Court. The judge and all counsel shall be notified of the time and place of the hearing.

(2) In extraordinary circumstances, the ~~board~~panel shall have the authority to extend the hearing date as it deems proper.

RULE 9. DISCOVERY

(a) Witnesses; Depositions. Within 20 days after the service of a response, or after the expiration of the time for service of a response, whichever occurs first, counsel for the board and the judge shall exchange the names and addresses of all persons known to have knowledge of the relevant facts. The presider of the ~~factfinding~~hearing panel shall set a date for the exchange of the names and addresses of all witnesses the parties intend to call at the hearing. Subpoenas and depositions shall be governed by Rule 2(~~d~~e).

(b) Other Evidence. Counsel for the board and the judge shall exchange:

(1) non-privileged evidence relevant to the Formal Complaint, documents to be presented at the hearing, witness statements and summaries of interviews with witnesses who will be called at the hearing; and

(2) other material only upon good cause shown to the presider of the ~~factfinding~~ panel.

The presider may authorize service of interrogatories upon request by the board or the judge.

(c) Exculpatory Evidence. Counsel for the board and the executive secretary shall provide the judge with exculpatory evidence relevant to the Formal Complaint.

(d) Duty of Supplementation. Both the board and the judge have a continuing duty to supplement information required to be exchanged under this rule.

(e) Completion of Discovery. All discovery ~~must~~shall be completed within 60 days of the service of the response or the expiration of the time for service of the response, whichever occurs first.

(f) Failure to Disclose. The presider of the ~~factfinding~~ panel may preclude either party from calling a witness at the hearing if the party has not provided the opposing party with the witness' name and address, any statements taken from the witness or summaries of any interviews with the witness.

(g) Resolution of Disputes. Disputes concerning discovery shall be determined by the

presider of the ~~factfinding~~ panel before whom the matter is pending. The decisions of the presider ~~of the factfinding panel~~ may not be appealed before entry of the ~~final order~~hearing panel's disposition in the disciplinary proceeding.

(h) Civil Rules Not Applicable. Proceedings under these rules are not subject to the Rules of Civil Procedure regarding discovery except Rules 26.03, 30.02-.07, 32.04-.05, and 37.04.

RULE 10. ~~FORMAL~~PUBLIC HEARING

~~**(a) Factfinder.** The formal hearing shall be a public hearing conducted before a three-member panel, acting as a factfinder. Members of the factfinding panel shall be appointed by the Chief Justice of the Supreme Court within 10 days of the filing of the Formal Complaint with the Supreme Court. One member of the factfinding panel who is either a judge or a lawyer shall be designated as the presider by the Chief Justice of the Supreme Court. Whenever possible, two members of the factfinding panel shall be retired judges, in good standing, but in any event, shall be either judges or lawyers, and one member of the factfinding panel shall be a citizen who is not a judge, retired judge or lawyer.~~

(~~b~~a) Rules of Evidence ~~and Due Process~~. ~~In the hearing, all~~All testimony shall be under oath~~;~~ and the Rules of Evidence shall apply~~, and the judge shall be accorded due process of law~~.

(e~~b~~) Presentation: Burden of Proof; Cross-Examination; Recording.

(1) An attorney or attorneys of the board's staff or special counsel retained for the purpose, shall present the matter to the ~~factfinder~~panel.

(2) The board has the burden of proving by clear and convincing evidence the facts justifying action.

(3) The judge shall be permitted to adduce evidence and produce and cross-examine witnesses, subject to the Rules of Evidence.

(4) Every formal hearing conducted under these rules shall be recorded verbatim.

(~~d~~c) Amendments. By leave of the presider of the ~~factfinding~~ panel for good cause shown or by consent of the judge, the Formal Complaint may be amended after commencement of the hearing if the judge and the judge's counsel are given adequate time to prepare a response.

RULE 11. PROCEDURE ~~FOLLOWING~~FOR FORMAL HEARING

(a) ~~Submission by Factfinder.~~ ~~The factfinder shall submit its findings and recommendations, along with the record and transcript of testimony, to the board for review. The same materials shall also be provided to the judge under investigation.~~**Findings.** The hearing panel shall make findings of fact and conclusions of law as to whether there is clear and convincing evidence that the judge committed misconduct under the grounds for discipline in Rule 4. If the panel finds there is not clear and convincing evidence, the panel shall dismiss the case. If the panel finds there is clear and convincing evidence, the panel shall impose or recommend sanctions under Rule 11(b).

~~(b) Objections to Findings. Counsel for the judge and board may submit written objections to the findings and recommendations.~~

~~(c) Appeal by the Board. The findings and recommendations and the hearing record shall be promptly reviewed by the board. The board may substitute its judgment for that of the factfinder.~~

(~~d~~b) ~~Recommended Discipline~~Disposition. ~~Based on~~ If the panel finds clear and convincing evidence ~~in the hearing record, the board shall make a to the Supreme Court of any of the following sanctions:~~of misconduct, the panel may:

(1) enter into a deferred disposition agreement for a specified period of time upon reasonable conditions, and the agreement may specify the disposition upon completion;

(2) issue a public reprimand; or

(3) recommend any of the following sanctions to the Supreme Court:

(~~1~~i) Removal;

(~~2~~ii) Retirement;

(~~3~~iii) Imposing discipline as an attorney;

(~~4~~iv) Imposing limitations or conditions on the performance of judicial duties;

(~~5~~v) Censure;

(~~6~~vi) Imposing a civil penalty;

(~~7~~vii) Suspension with or without pay; or

(~~8~~viii) Any combination of the above sanctions.

(c) **Appeal.** The board or judge may appeal the disposition of the panel. The appeal shall proceed under Rule 14. The disposition of the panel becomes final if no appeal is taken within 60 days after issuance of the disposition. If the panel determines it is appropriate to issue a public reprimand, the reprimand shall be stayed until the time for appeal has run.

~~(c) Quorum; Dissent; Dismissal.~~

~~(1) A recommendation for discipline shall be reported to the Supreme Court only if concurred in by a majority of the full board.~~

~~(2) If a majority of the full board fail to concur in a recommendation for discipline, the matter shall be dismissed.~~

~~(3) Any dissenting opinion shall be transmitted to the Supreme Court with the majority decision.~~

ADVISORY COMMITTEE COMMENT--1999 AMENDMENT

~~*Rule 11(d)(5) has been modified by deleting reprimand from the list of sanctions that may be issued after a formal hearing. Under Rule 6(d)(1)(ii), a reprimand may be issued by the board without resort to formal proceedings in situations involving conduct that is unacceptable under*~~

~~*one of the grounds for judicial discipline but not so serious as to warrant further discipline, such as a censure, by the Supreme Court.*~~

RULE 12. COSTS

(a) Witness Fees.

(1) All witnesses shall receive fees and expenses to the same extent allowable in an ordinary civil action.

(2) Expenses of witnesses shall be borne by the party calling them, unless:

(i) Physical or mental disability of the judge is in issue, in which case the board shall reimburse the judge for the reasonable expenses of the witnesses whose testimony is related to the disability; or

(ii) The judge is exonerated of the charges, in which case the Supreme Court may determine that the imposition of costs and expert witness fees would work a financial hardship or injustice and shall then order that those fees be reimbursed.

(b) Transcript Cost. A transcript of all proceedings shall be provided to the judge without cost.

(c) Other Costs. All other costs of these proceedings shall be at public expense.

RULE 13. DISPOSITION BY CONSENT

(a) Agreement. At any time after issuance of the Formal Complaint or Formal Statement of Disability Proceeding and before conclusion of any hearing panel proceedings under Rules 10, 11, and 16, the judge and the board may enter into an agreement by which the judge admits to any or all of the charges or allegations of disability in exchange for a stated disposition. Entry into the agreement shall stay the proceedings of the hearing panel. The agreement shall set forth:

(1) a statement of the facts;
(2) the allegations to which the judge is admitting; and
(3) the agreed upon disposition.

(b) Disposition. If the agreed upon disposition is one the board is authorized to impose under Rule 6(f)(4), proceedings before the hearing panel shall terminate, and the board shall impose the disposition. If the agreed upon disposition is one the Board is not authorized to impose under Rule 6(f)(4), the agreement shall be submitted to the Supreme Court. The Court shall either enter an order implementing the agreement or rejecting the agreement. If the stated disposition is rejected by the Supreme Court, the agreement may be withdrawn but the facts admitted to in the agreement can be used against the judge in such further proceedings as the Court may direct.

RULE ~~13~~14. SUPREME COURT REVIEW

(a) Filing and Service. The ~~board~~hearing panel shall, at the time it files its record,

findings, and recommendations with the Supreme Court, serve copies upon the board and respondent judge. Proof of service shall also be filed with the Court.

(b) Prompt Consideration. Upon the filing of a recommendation for discipline or disability retirement, the Court shall promptly docket the matter for expedited consideration, but not sooner than the end of the time allowed for appeal of the panel's decision by the board or judge. The Court shall consider the recommended discipline or disability retirement at the same time as any appeal regarding those recommendations.

(c) Briefs. The board shall, and the judge may, file briefs with the Court in accordance with the requirements of Rule 128, Rules of Civil Appellate Procedure.

(d) Additional Findings and Filings; Supplemental Record.

(1) If the Court desires an expansion of the record or additional findings with respect either to the recommendation for discipline or to the sanction to be imposed, it shall remand the matter to the ~~board~~hearing panel with appropriate directions, retaining jurisdiction, and shall stay proceedings pending receipt of the ~~board's~~panel's filing of the additional record.

(2) The Court may order additional filings or oral argument as to specified issues or the entire matter.

(3) The Court without remand and prior to the imposition of discipline may accept or solicit supplementary filings with respect to medical or other information, provided that the parties have notice and an opportunity to be heard.

(e) Delay for Further Proceedings. The Court, on receipt of notice of an additional proceeding before the board involving the same judge, may stay proceedings pending the board's termination of this additional proceeding. In the event that additional recommendations for discipline of the judge are filed, the Court may impose a single sanction covering all recommendations.

(f) Decision. When the hearing panel recommends the Supreme Court impose sanctions under Rule 11(b)(3), ~~T~~hethe Court shall review the record of the proceedings on the law ~~and~~, giving deference to the facts, and shall file a written opinion and judgment directing such disciplinary action as it finds just and proper~~,~~. If the judge or board has filed an appeal under Rule 11(c), the Court may accept the recommendation of the panel, or ~~accepting,~~ reject~~ing~~ or modify~~ing~~ it in whole or in part~~, the recommendation of the board~~.

(g) Consideration of Lawyer Discipline. When the ~~Board on Judicial Standards~~panel recommends the removal of a judge, the Court shall promptly notify the judge and the Lawyers Professional Responsibility Board and give them an opportunity to be heard in the Court on the issue of lawyer discipline.

(h) Charge Against Supreme Court Justice. When any Formal Complaint has been filed against a member of the Supreme Court, the review under Rule ~~13~~14 shall be heard and

submitted to a panel consisting of the Chief Judge of the Court of Appeals or designee and six others chosen at random from among the judges of the Court of Appeals by the Chief Judge or designee.

(i) Petition for Rehearing. In its decision, the Court may direct that no petition for rehearing will be entertained, in which event its decision shall be final upon filing. If the Court does not so direct, the respondent may file a petition for rehearing in accordance with the requirements of Rule 140, Rules of Civil Appellate Procedure.

RULE ~~14~~15. INTERIM SUSPENSION

(a) Pending Criminal Prosecution. The Supreme Court may, without the necessity of board action, suspend a judge with pay upon the filing of an indictment or complaint charging the judge with a crime punishable as a felony under state or federal law. The Supreme Court may suspend the pay of such judge upon a conviction of a crime punishable as a felony under state or federal law or any other crime involving moral turpitude. If the conviction is reversed, suspension terminates and the judge shall be paid the salary for the period of suspension.

(b) Pending Final Decision. Interim suspension, with pay, pending final decision as to ultimate discipline, may be ordered by the Supreme Court in any proceeding under these rules.

(c) Review of Permissive Suspension. Any judge suspended under section (b) of this rule shall be given a prompt hearing and determination by the Supreme Court upon application for review of the interim suspension order.

~~**(d) Incompetency Suspension.** Upon a determination by the board of a judge's incompetence, there shall be an immediate interim suspension, with pay, pending a final disposition by the Supreme Court.~~

~~**(e) Disability Suspension.** A judge who claims that a physical or mental disability prevents the judge from assisting in the preparation of a defense in a proceeding under these rules shall be placed on interim suspension, with pay. Once an interim suspension has been imposed, there shall be a determination pursuant to Rule 15 of whether in fact there is such a disability. If there is such a disability, the judge may be retired. If there is a finding of no disability, the disciplinary proceeding shall continue.~~

RULE ~~15~~16. SPECIAL PROVISIONS FOR CASES INVOLVING ~~PHYSICAL OR MENTAL~~ DISABILITY.

(a) ~~Procedure~~Proceedings In General. ~~In carrying out its responsibilities regarding physical or mental disabilities, the~~The board shall follow the same procedures ~~that it employs~~used with respect to ~~discipline for~~ misconduct, except as modified by this rule.

(b) Initiation of Proceedings. The board may initiate an inquiry into a case involving disability:

(1) upon receiving a complaint alleging a disability;
(2) when an investigation indicates the alleged conduct may be due to disability; or
(3) when the judge asserts inability to defend in a disciplinary proceeding due to a disability.

(c) Preliminary Evaluation. Upon initiation of an inquiry into a case involving disability, the executive secretary shall conduct a preliminary evaluation pursuant to Rule 6(c).

(ed) Investigation; Notice; Medical Privilege.

(1) If upon review of the preliminary evaluation, or on its own motion, the board authorizes an investigation under Rule 6(d), the board shall give notice pursuant to Rule 6(d)(2) to the judge alleged to have a disability. The notice shall instruct the judge that when providing a written response under Rule 6(d)(5), the judge shall admit or deny the disability.

(2) The purpose of an investigation conducted under this rule shall be to determine whether there is reasonable cause to believe the judge has a disability.

(~~1~~3) ~~If the complaint involves the physical or mental condition of the judge, a denial of the alleged condition shall constitute a waiver of medical privilege, and the judge shall be required to produce the judge's medical records.~~ If the judge admits to a disability or provides affirmative evidence of a disability as a defense in a disciplinary proceeding, the admission or provision of evidence shall constitute reasonable cause to believe the judge has a disability and waiver of medical privilege as to records relevant to the alleged disability.

If the judge denies the disability, the board shall determine whether there is credible evidence of a disability. The board may consult with a qualified professional in the area of the alleged disability to determine if the evidence before the board constitutes credible evidence. If there is credible evidence of a disability, the denial constitutes a waiver of medical privilege as to records relevant to the alleged disability. If there is not credible evidence of a disability, the judge does not waive medical privilege, and the board shall resume disciplinary proceedings.

(4) If medical privilege is waived, the board may request the judge's medical records relevant to the alleged disability. Disputes concerning the relevancy of medical records shall be determined by the Supreme Court or its designee.

(~~2~~5) If medical privilege is waived, the ~~judge is deemed to have~~board may request that the judge consented to a physical or mental examination by a qualified medical practitioner designated by the board. The purpose of the examination shall be to assist the board in determining whether there is reasonable cause to believe the judge has a disability. The report of the medical practitioner shall be furnished to the board and the judge. If the judge fails or refuses to submit to a medical examination, the judge may not present as evidence the results of any medical examinations done on the judge's behalf, and the board may consider the judge's refusal or failure as evidence that the judge has a disability.

The judge has the right to an additional independent medical examination provided by experts other than those designated by the board, but the examination shall be at the sole expense of the judge, and written reports of any examination shall be provided to the board as soon as medically feasible.

(e) Disposition After Investigation.

(1) If the board determines there is not reasonable cause to believe the judge has a disability, the matter shall resume as a disciplinary proceeding.

(2) If the board determines there is reasonable cause to believe the judge has a disability, the board may:

(i) enter into a deferred disposition agreement as provided in Rule 6(f)(4)(i); or
(ii) issue a Formal Statement of Disability Proceeding.

(f) Hearing. Upon issuance of a Formal Statement of Disability Proceeding, a hearing shall be held under Rules 10 and 11 to determine whether there is clear and convincing evidence the judge has a disability. If the board has also filed a Formal Complaint, the hearing panel shall determine whether there is clear and convincing evidence that the judge committed misconduct and whether the misconduct was related to a disability. The hearing panel may exclude the public from portions of the proceedings to hear evidence on psychological or medical materials or other evidence that would not be accessible to the public.

(1) If the hearing panel finds clear and convincing evidence of a disability, the panel may:

(i) enter into a deferred disposition agreement as provided in Rule 11(b)(1); or
(ii) recommend any of the following actions to the Supreme Court:

(A) Removal;
(B) Disability retirement;
(C) Imposing limitations or conditions on the performance of judicial duties;
(D) Suspension with or without pay; or
(E) Any combination of the above actions.

(2) The hearing panel may also impose or recommend a disciplinary disposition with regard to misconduct, if applicable, pursuant to Rule 11(b).

(3) Any disposition of the hearing panel is public.

(4) The board or judge may appeal the decision of the panel as provided in Rule 11(c).

(g) Petition for Reinstatement After Disability Suspension.

(1) A judge suspended by the Supreme Court based upon disability may petition the board for reinstatement. Reinstatement may only be effected by order of the Supreme Court.

(2) The judge shall provide to the board the name of each qualified medical, psychological, or other expert, or qualified program or referral by whom or in which the judge has been examined or treated relevant to the disability since suspension. The judge shall furnish to the board written consent to the release of information and records from these sources.

(3) Upon the filing of a petition for reinstatement, the board may take or direct whatever action it deems necessary to determine whether the disability has been removed, including requesting the judge to consent to a physical or mental examination by a qualified medical practitioner designated by the board.

(4) If the board determines, after conducting a review under paragraph (3), the judge has been restored to capacity to perform judicial duties, the board shall recommend to the Supreme Court that the judge be reinstated. If the board determines that the judge continues to have a disability, it shall notify the judge of its determination. The judge shall have 20 days after service of the notice to either accept the determination of the board or request a formal hearing on the petition. If the judge accepts the determination of the board, there will be no further proceedings on the petition. If the judge requests a formal hearing, proceedings will continue under Rule 16(f), but the petition shall replace the Formal Statement of Disability Proceeding.

(~~b~~h) Representation by Counsel. If the judge in ~~a matter relating to physical or mental disability~~any proceeding under this rule is not represented by counsel, the board or, if a ~~factfinding~~hearing panel has been appointed, the presider of the ~~factfinding~~ panel, shall appoint an attorney to represent the judge at public expense.

RULE ~~16~~17. INVOLUNTARY RETIREMENT

(a) Procedure. A judge who refuses to retire voluntarily may be involuntarily retired by the Supreme Court. If attempts to convince a judge to retire voluntarily fail, then the board shall proceed as provided in Rules 8, 9, 10 and 11. The Supreme Court shall then proceed as provided in Rule 13.

(b) Effect of Involuntary Retirement. A judge who is involuntarily retired shall be ineligible to perform judicial duties pending further order of the Supreme Court and may, upon order of the Supreme Court, be transferred to inactive status or indefinitely suspended from practicing law in the jurisdiction.

RULE 18. APPLICATION TO THE GOVERNOR FOR DISABILITY RETIREMENT

If a judge applies to the governor for disability retirement, the governor, or designee, may make a written request that the board provide the governor with information about the existence, status, and nature of any pending complaints or investigations relating to the judge. The board must promptly provide the information to the governor. Upon receipt of a written waiver by the judge, the board may also provide the governor with any of the board's documents related to the complaint, investigation, or the judge. The governor may consult with a qualified professional in the area of the alleged disability.

RULE ~~17~~19. EXPUNGEMENT

The executive secretary shall expunge records as follows:

(a) Dismissals. All records or evidence of a complaint found without ~~sufficient~~reasonable cause shall be destroyed three years after the ~~complaint is received by the~~ board receives the complaint or ~~the board~~ authorizes an investigation, whichever occurs first~~, except in the event of~~. If the board receives a new complaint involving the same judge within the three years ~~which event~~, the new complaint shall renew the three-year period.

(b) Case Files on Deceased Judges. All case files on deceased judges shall be destroyed.

(c) Exceptions. Upon application by the executive secretary to the ~~chairperson~~chair for good cause shown and with notice and opportunity to be heard to the judge, records which would otherwise be expunged under this rule may be retained for such additional time as the ~~chairperson~~chair may deem appropriate.

RULE 20. USE OF ALLEGATIONS FROM DISMISSED COMPLAINTS.

(a) Use of Allegations in General. Allegations from a complaint that was dismissed shall not be referred to by the board in any subsequent proceedings or used for any purpose in any judicial or lawyer disciplinary proceeding against the judge, except as provided in this rule.

Allegations from a dismissed complaint may be reinvestigated with permission of the board if, within three years after dismissal, additional information becomes known to the board regarding the complaint.

(b) Use of Allegations From Dismissal with Letter of Caution. Allegations from a complaint dismissed with a letter of caution may be used within three years after dismissal in subsequent proceedings only as follows:

(i) The fact that the complaint was dismissed with a letter of caution may not be used to establish the misconduct alleged in a subsequent proceeding. However, the underlying conduct described in the letter of caution may be charged in a subsequent Formal Complaint, and evidence in support thereof may be presented to the hearing panel at the public hearing under Rule 10.

(ii) If the underlying conduct described in the letter of caution is charged in a subsequent Formal Complaint, and the hearing panel finds the judge committed misconduct with respect to the facts underlying the dismissal with letter of caution, the letter of caution may be considered by the panel in determining an appropriate sanction.

RULE 21. PERIODIC REVIEW

The Supreme Court may periodically appoint a committee to review the records and proceedings of the board for the purpose of evaluating the effectiveness of the disciplinary

process. The records and proceedings reviewed by the committee shall be maintained as confidential except for records and proceedings that have already been made public. The final written and oral report of the committee may present information about the board as long as it contains no specific information that would easily identify a judge, witness, or complainant.

RULE ~~18~~22. AMENDMENT OF RULES

As procedural and other experience may require or suggest, the board may petition the Supreme Court for further rules of implementation or for necessary amendments to these rules.

APPENDIX A - ORDER ESTABLISHING COMMITTEE

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

ORDER ESTABLISHING ADVISORY COMMITTEE ON RULES OF THE BOARD ON JUDICIAL STANDARDS

The Rules of the Board on Judicial Standards were last amended by this Court by order filed March 30, 1999, to address the narrow issue of the interrelationship between the Board on Judicial Standards and Lawyers Professional Responsibility Board. By order filed September 16, 1988, the Rules were amended to address gender neutrality. The last comprehensive review of the Rules occurred when the Rules were amended by order filed May 23, 1986. In its report dated September 15, 2004, the Advisory Committee on Code of Judicial Conduct and Rules of the Board on Judicial Standards recommended that an ad hoc committee be established with a broad mandate to generally review and recommend improvements to the Rules of the Board on Judicial Standards. The Court has determined that it is necessary to reconvene an advisory committee for this purpose.

IT IS HEREBY ORDERED:

1. The Advisory Committee on Rules of the Board on Judicial Standards, to be Chaired by Honorable Gary J. Pagliaccetti, St. Louis County District Court Judge, shall be reconstituted and reconvened to review and recommend proposed changes to the Rules of the Board on Judicial Standards.

2. The following persons are appointed as members of the Advisory Committee:

Senator Don Betzold, Legislative District 51
Honorable Tanya Bransford, Hennepin County District Court Judge
Felicia J. Boyd, Faegre & Benson, LLP
Honorable Edward Cleary, Ramsey County District Court Judge
Annamarie Daley, Robins, Kaplan, Miller & Ciresi

Karen Janisch, General Counsel to the Governor
Jeff Johnson, Midwest Employment Resources
Robert M.A. Johnson, Anoka County Attorney
Jeremy Lane, Mid-Minnesota Legal Assistance
Commander Bill Martinez, St. Paul Police Department
Honorable Leslie Metzen, Dakota County District Court Judge
Sharon Mohr, Human Resources Director, Hennepin Technical College
Senator Tom Neuville, Legislative District 25
Amy Rotenberg, Rottenberg Associates, LLC
Patrick Sexton, Department of Commerce
Representative Steve Simon, House District 44A
Dane Smith, Media Consultant
Representative Steve Smith, Legislative District 33A
Virginia Stringer, Chair, First American Funds
Honorable William Walker, Retired District Court Judge
William Wernz, Dorsey & Whitney, LLP
DePaul Willette, Former Executive Secretary of the Board on Judicial Standards
Honorable Bruce Willis, Minnesota Court of Appeals Judge

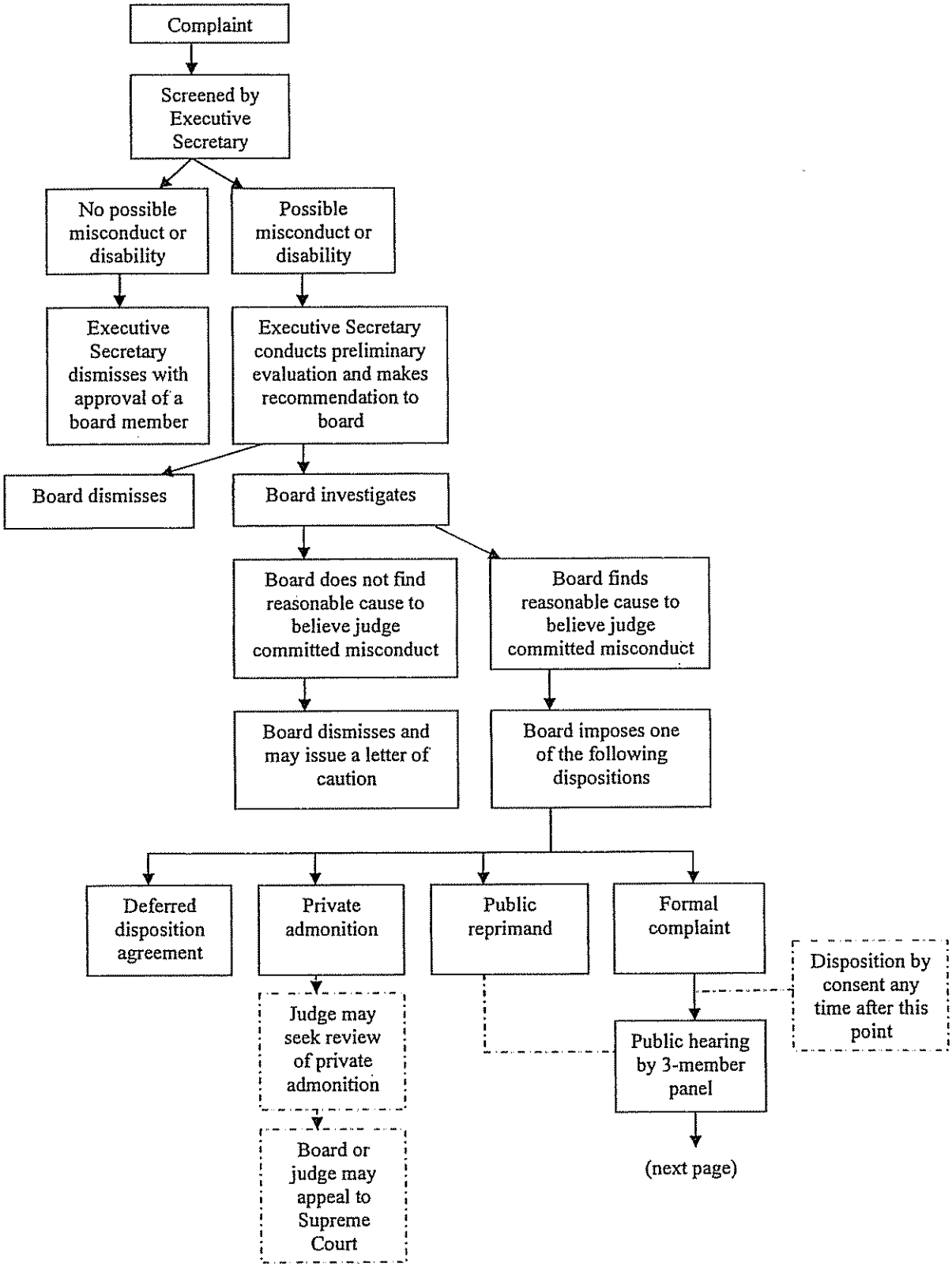
3. The Advisory Committee shall make its final report to this Court on or before November 15, 2007.

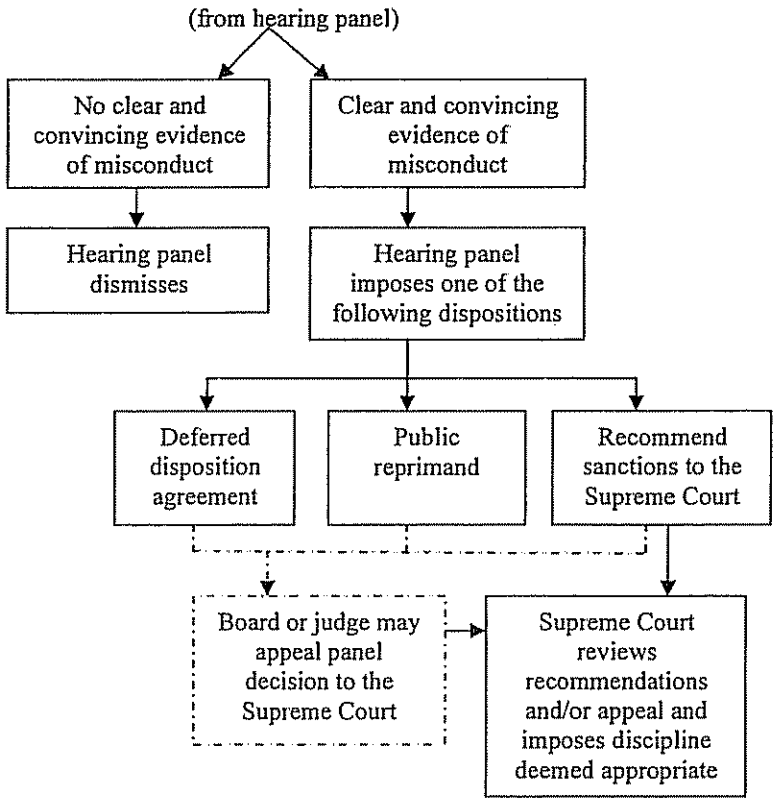
Dated: April 3rd, 2007

BY THE COURT:

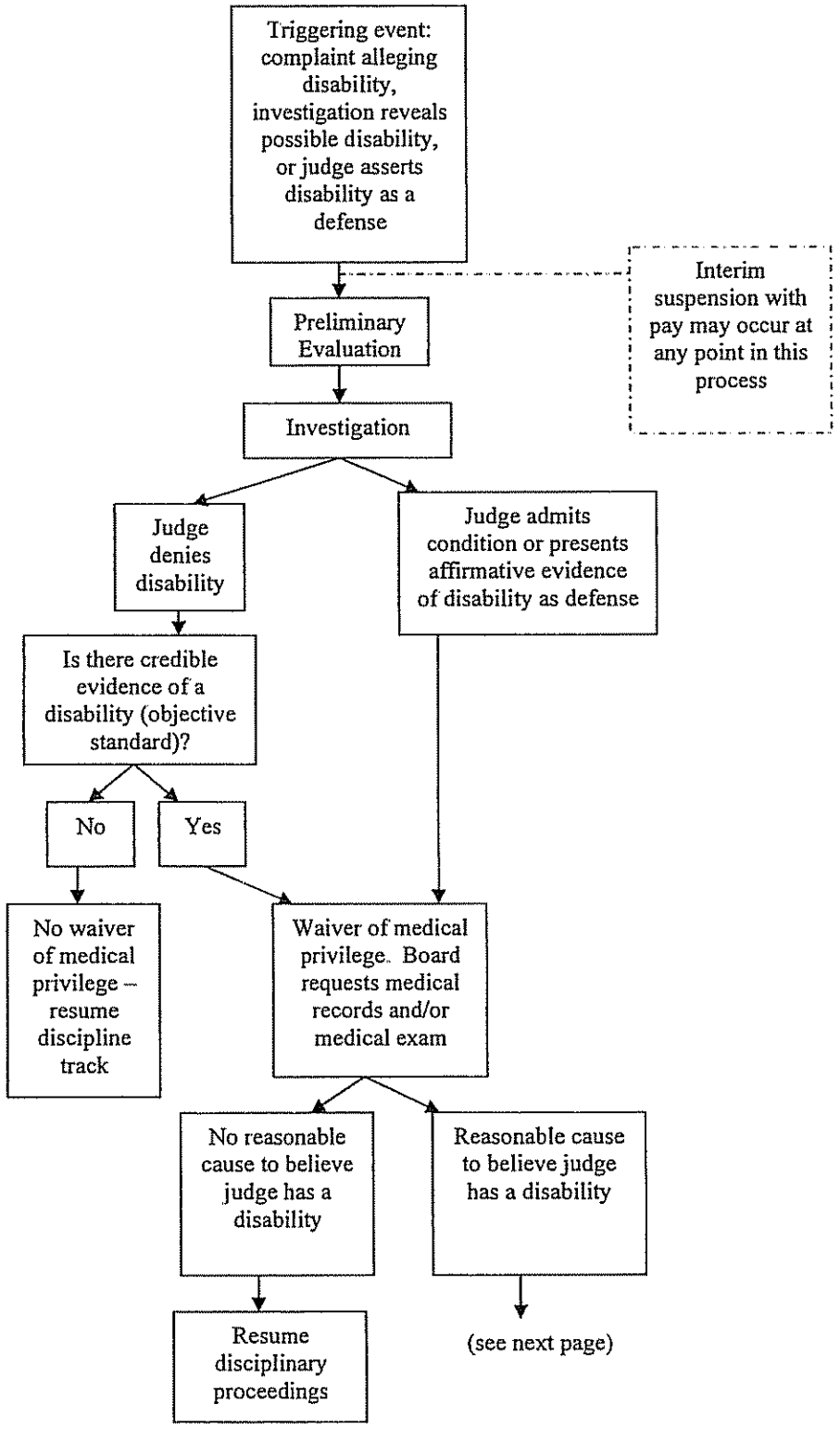
Russell A. Anderson
Chief Justice

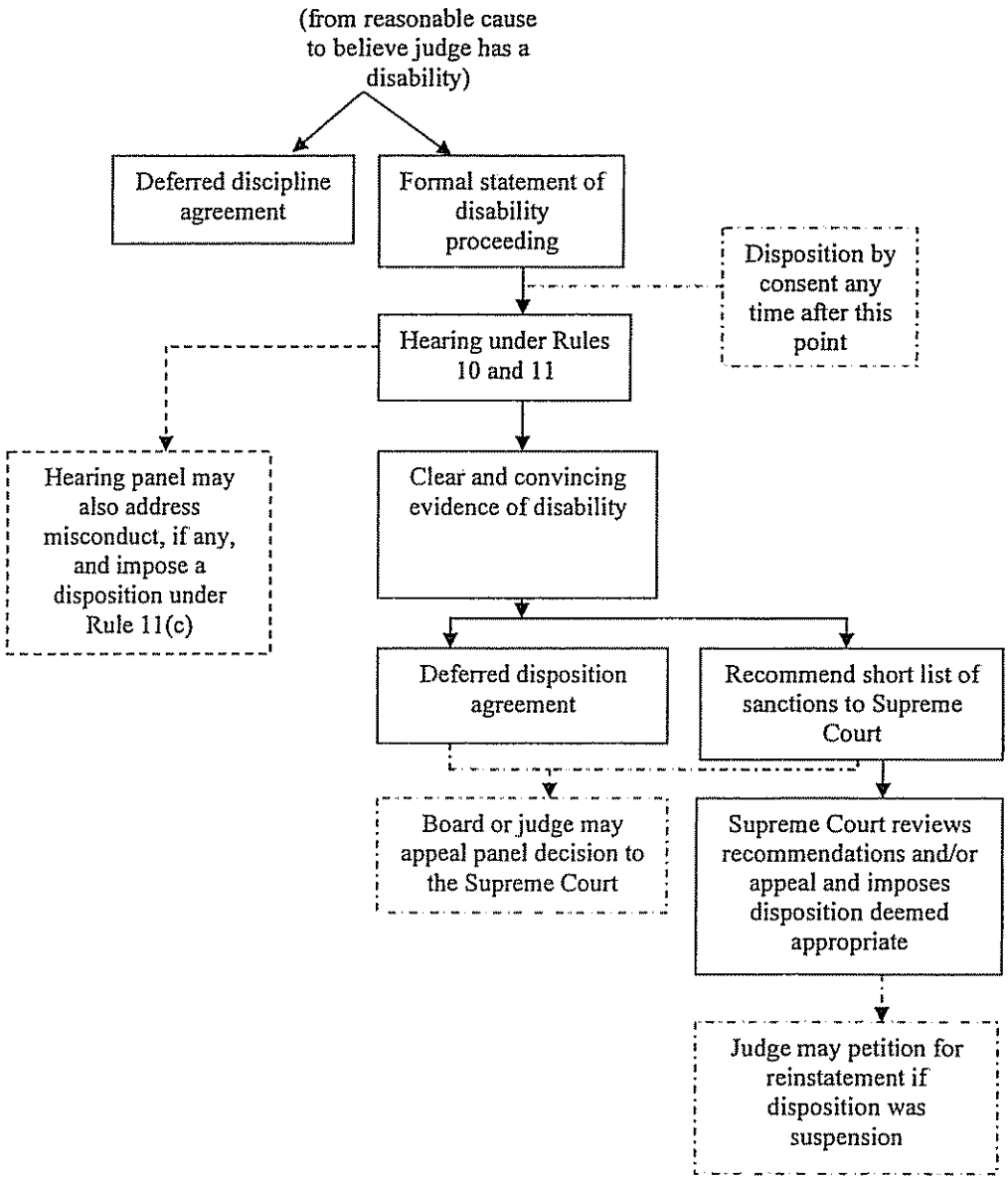
APPENDIX B – COMPLAINT PROCESS FLOW CHART




(from hearing panel)
No clear and convincing evidence of misconduct
Clear and convincing evidence of misconduct
Hearing panel dismisses
Hearing panel imposes one of the following dispositions
Deferred disposition agreement
Public reprimand
Recommend sanctions to the Supreme Court
Board or judge may appeal panel decision to the Supreme Court
Supreme Court reviews recommendations and/or appeal and imposes discipline deemed appropriate

APPENDIX C – FLOW CHART FOR CASES INVOLVING JUDGES WHO MAY HAVE A DISABILITY




(from reasonable cause to believe judge has a disability)
Deferred discipline agreement
Formal statement of disability proceeding
Disposition by consent any time after this point
Hearing under Rules 10 and 11
Hearing panel may also address misconduct, if any, and impose a disposition under Rule 11(c)
Clear and convincing evidence of disability
Deferred disposition agreement
Recommend short list of sanctions to Supreme Court
Board or judge may appeal panel decision to the Supreme Court
Supreme Court reviews recommendations and/or appeal and imposes disposition deemed appropriate
Judge may petition for reinstatement if disposition was suspension

APPENDIX D – PERSONS WHO PRESENTED DURING COMMITTEE PROCEEDINGS

All presenters are noted in order of presentation.

June 8, 2007 Meeting
Rick Slowes, Office of Supreme Court Commissioner
Hon. James Dehn, Chair, Board on Judicial Standards
David Paull, Executive Secretary, Board on Judicial Standards[1]
Hon. Charles Porter, MDJA Representative
Hon. Ken Jorgenson, MDJA Representative
Hon. Marilyn Kaman, MDJA Representative
Tim Kinley, Public Citizen
Elizabeth Sletten, Public Citizen
Nancy Lazaryan, Public Citizen

July 20, 2007 Meeting
Martin Cole, Director, Office of Lawyers Professional Responsibility

September 21, 2007 Meeting
Cynthia Gray, Director of the Center for Judicial Ethics
Robin Wolpert, Reporter for the Citizen's Commission for an Impartial Judiciary

January 31, 2008 Public Forum
Connie Neal, Public Citizen
Lynda Simon, Public Citizen
Leslie Davis, Public Citizen
Darrell Brown, Public Citizen
Elizabeth Sletten, Public Citizen
Nancy Lazaryan, Public Citizen
Tim Kinley, Public Citizen
Bob Zick, Public Citizen
Thomas Hussman, Public Citizen
Patrice Nerad, Public Citizen

[1] David Paull also provided information at the committee's request at the August 10, 2007, meeting.

APPENDIX E – ABSTRACT OF PRESENTATIONS MADE DURING COMMITTEE PROCEEDINGS

Summaries are provided in order of presentation.

June 8, 2007 Meeting

Rick Slowes – Rick Slowes, Supreme Court Commissioner, presented information regarding gaps in the Rules relating to mental health revealed in recent cases before the board and the Supreme Court (e.g., Ginsberg). Some of the gaps discussed were whether interim suspension is appropriate when mental health is at issue, whether the Governor's granting a disability retirement ends the proceedings at the Supreme Court, and whether there are any actions available to the board for a nonpermanent disability. The full set of issues was included in the handout prepared by Rick Slowes that was provided in the meeting packet.

Hon. James Dehn – Judge James Dehn, Chair of the Board on Judicial Standards, thanked the Supreme Court for establishing the committee, and referred to the letter submitted by the Board on Judicial Standards to the Court outlining the issues the board believed needed to be addressed in the rules. Judge Dehn also noted that though there are 2.1 million files initiated in the courts each year, the board receives very few complaints in comparison.

David Paull - David Paull, Executive Secretary of the Board on Judicial Standards, addressed the committee with comments regarding the Rules and operations of the board, which he summed up in five words: access, fairness, protection, independence, and perspective. He explained the proposals submitted by the board to address mental disability and the private reprimand process. He suggested to the committee that a successful approach would incorporate these considerations: 1) whether the proposal preserves public access and sufficient opportunity for the subject of the complaint to respond; 2) whether the proposal preserves the independent atmosphere of the board; and 3) whether the proposal asks the board to go beyond its mission to delve into matters that do not concern personal conduct, but rather would require the board to review procedural or legal determinations.

Hon. Charles Porter – Judge Charles Porter presented on behalf of the Minnesota District Judges Association (MDJA), which provided the committee with written recommendations in advance of the meeting. He covered three thematic areas of concern for the MDJA: (1) the integrity of the process that occurs before the board; (2) confidentiality; and (3) due process and fundamental fairness. With regard to integrity, MDJA recommended that the committee consider: (1) dividing the prosecutorial and adjudicatory functions of the board; (2) taking steps to ensure that the board is adequately funded so that disciplinary decisions are not made based on whether they can be funded; and (3) recommending that at least one staff position on the board be a judge. With regard to confidentiality, MDJA suggested that the identity of the complainant should be disclosed in every case in which the judge is asked to respond, the judge should be entitled to a defense prior to the public hearing stage, and the judge should be entitled to know whether any members of the board have recused themselves from the decision making process. With regard to due process and fundamental fairness, MDJA's suggestions included that there should be discovery at the private as well as public stages of the proceedings, the board should not be able

to substitute its findings for that of the fact finding panel, and the issue of whether a majority of the quorum or a majority of the board is required should be resolved.

Hon. Kenneth Jorgenson – Judge Kenneth Jorgenson also presented on behalf of MDJA. He commented that the current rules follow an outdated structure whereby the board has the ability to substitute its own findings for that of a fact finding panel. A more modern structure would place a constitutional judge in the role of the fact finder and establish the board as an advocate in the prosecutorial process. When asked what weight the findings of the fact finder should have, he responded, "clearly erroneous." He also stated MDJA recommends that once a case reaches the public hearing stage, the board should be an adversary in the action, not a decision maker.

Hon. Marilyn Kaman – Judge Marilyn Kaman also presented on behalf of MDJA. She commented that in making the recommendations presented to the committee at this meeting, MDJA attempted to be fair. She noted that the hearing process is imbalanced in that the judge is not given an opportunity to respond to the complaint or engage in discovery until very late in the process.

Tim Kinley – Tim Kinley, public citizen, informed the committee he is concerned that the judicial system lacks checks and balances, and he questioned how two opinions from the appellate courts could cite the same rule but have radically different outcomes. He questioned the practice of the Court of Appeals in releasing unpublished opinions. He also stated that the board is like a black hole; complaints go in but no one knows what happens to them. He expressed strong disagreement with the formation of this committee and stated that the meetings should be cancelled and the issue taken up by the Legislature. He also requested that the committee hold at least one meeting in the evening so others will have an opportunity to address the committee.

Elizabeth Sletten – Elizabeth Sletten, public citizen, commented that in 2005 she submitted a complaint to the board consisting of 200 pages (an 8-page cover letter and 192 pages of evidence). She stated her complaint showed the judge was acting improperly in his handling of the case. She asked, if judges are acting outside of the rules and laws and that is not misconduct, what is? She closed by reading a one-page response from the board stating no action would be taken on her complaint.

Nancy Lazaryan – Nancy Lazaryan, public citizen, commented that the Minnesota Constitution gave the power to the Legislature to regulate, discipline, and remove judges. Even though Chapter 490 delegates rulemaking authority to the Supreme Court, it is her view that this authority cannot be delegated. She stated the board has failed miserably in serving the citizens of Minnesota. She then cited some examples of misconduct, including misconduct that prompted her to file a complaint of impeachment with the Legislature. The Legislature referred the matter to the board and she received a response stating the complaint had no merit. She stated she has no respect for the Judiciary.

July 20, 2007 Meeting

Martin Cole - Martin Cole, Director of the Officers of Lawyers Professional Responsibility, presented an explanation of the complaint process utilized by the Lawyers Professional Responsibility Board. Some of the key attributes of the complaint process were: (1) lawyers receive notice of all complaints; (2) both the Office and the board have the authority to issue private discipline in the form of an admonition for behavior that is isolated and not serious; (3) if the complainant is not satisfied with the private discipline result, the complainant may appeal and the case will go to a member of the board for review; if the attorney wants to appeal, the case goes to a Board panel; (4) formal investigations are handled by a District Ethics Committee comprised of volunteers; recommendations of the committee are accepted 90-95% of the time; (5) the process does allow for interrogatories, though they are not utilized in every case, and as such are not burdensome; (6) lawyers who are the subject of a complaint may be represented by counsel during the process, and most do choose to obtain representation; (7) proceedings become public upon the filing of a formal petition with the Supreme Court. Mr. Cole also provided general information about the funding mechanism and budget for the Office of Lawyers Professional Responsibility.

September 21, 2007 Meeting

Cynthia Gray – Cynthia Gray, Director of the Center for Judicial Ethics, presented general information regarding national trends in judicial discipline, and responded to specific questions from the committee. A more detailed summary of her presentation is included in Appendix F – September 21, 2007 Meeting Summary.

Robin Wolpert – Robin Wolpert, Reporter for the Citizen's Commission for an Impartial Judiciary, reported on the discussions and results from the commission. A more detailed summary of her presentation is included in Appendix F – September 21, 2007 Meeting Summary.

January 31, 2008 Public Forum

Connie Neal – Connie Neal, public citizen, asked the committee to consider whether Rule 2 of the Rules of the Board on Judicial Standards is adequate to address complaints alleging serious misconduct that may rise to the level of criminal wrongdoing. In support of her position, she provided the committee with two documents regarding allegations of bankruptcy fraud. Ms. Neal also suggested the committee review Rule 10 of the Rules Governing Complaints of Judicial Misconduct and Disability for the Eighth Circuit.

Lynda Simon – Lynda Simon, public citizen, told the personal story of her experience in seeking a divorce. She stated that she believed she was mistreated by the judge, and that her spouse received favorable treatment. She informed the committee that she was in the process of filing a complaint against the judge with the Board on Judicial Standards. She stated that she understood from others that the judge who presided in her case treated others in a similar manner, and asked, "What is the board going to do for me?"

Leslie Davis – Leslie Davis, public citizen, testified that he formed the Earth Protect marketing group in 1983. He stated that in that role, he engaged in numerous court cases, and always went to court thinking he would get justice, but the decisions were rendered on the wrong side of the people. He offered the Prior Lake plan as an example of a case in which he believed decisions were made improperly, resulting in outcomes that were not intended by the original owner of the land.

Darrel Brown – Darrel Brown, public citizen, testified to the committee that he ran for State Senate in the 44th District in order to locate people who had been abused by a particular judge. He stated he believes that he should be able to convene a grand jury to investigate the matter. He also stated that the people need an independent body that they can contact with complaints and that can investigate matters without its hands being tied as are those of the Board on Judicial Standards.

Elizabeth Sletten – Elizabeth Sletten, public citizen, testified that she has filed numerous complaints with the Board on Judicial Standards and the Office of Lawyers Professional Responsibility, but that none of the complaints have been properly investigated. She informed the committee of her desire to make a full evidentiary presentation, and noted that because of the 10-minute time limit, her due process rights had been violated under the open meeting law. She informed the committee that it is her belief the committee is acting outside of the law because it is self-regulating.

Nancy Lazaryan – Nancy Lazaryan, public citizen, explained to the committee that she has been working with Representative Dan Severson to identify corruption in the judiciary. She explained her understanding of the Minnesota Constitution and the authority of the Minnesota Legislature to discipline judges. She stated that by natural law, which is based on human beings' natural tendency to exercise right reason in dealing with others, the citizens of Minnesota employ the judiciary. The citizens established the Minnesota State Constitution as its method of disciplining its employees. Article 6, Section 9 of the Minnesota State Constitution, empowers the Legislature to discipline judges. It is her understanding the Legislature enacted Minnesota Statutes, section 490.15 (1971) – the statute authorizing the Board on Judicial Standards (now Minn. Stat. § 490A.01 (2007)) – in direct response to the constitutional provision. She stated that the citizens of Minnesota are not happy with the job performance of the judiciary. She further expressed her belief that the Committee on the Rules of the Board on Judicial Standards is committing fraud in coming together to create rules without authority to do so, and that the actions of the committee prove that the Judicial Branch is out of control.

Tim Kinley – Tim Kinley, public citizen, testified that he has observed court cases and while he does not know the law, he knows he has seen unacceptable behavior. He informed the committee that some individuals have requested to appear before the Board on Judicial Standards because they do not understand what is going on, and he suggested that it would be helpful for someone to explain to the individuals when the complaint is about a legal decision. He also suggested that the situation would be aided by allowing cameras in the courtroom. He informed the committee that the citizens will have their own board on judicial standards, and will do their own data collection. Mr. Kinley also requested that David Paull resign.

Bob Zick – Bob Zick, public citizen, stated that he is an electrician. As an electrician, his work is inspected. He stated that he is not afraid to have his work inspected, and asked why judges are afraid to have their work inspected. He stated that he has heard people say that judges cannot be held accountable because their decisions are merely opinions. He feels those opinions do a lot of harm. He voiced objection to the notion of appointing rather than electing judges. Finally, he stated that he does not want judges making his laws; he wants the legislature making his laws.

Thomas Hussman – Thomas Hussman, public citizen, expressed his concern that this is a problem that is getting worse, and that though we do not want to believe judges are corrupt, it is happening.

Patrice Nerad – Patrice Nerad, public citzen, testified that she was shocked to learn that something she deeply believed in and thought functioned [the judiciary] does not function. She believes there is lack of accountability and checks and balances in the judicial system. She stated that the challenge of this advisory committee is to take a serious look at the judiciary from a systems perspective. She further suggested that the new law from Representative Severson's office deserves serious review.

APPENDIX F - MEETING SUMMARY, 9/21/2007

Committee on Rules of the Board on Judicial Standards
September 21, 2007

Members Present:

Hon. Paul Anderson
Sen. Don Betzold
Hon. Tanya Bransford
Hon. Edward Cleary
Annamarie Daley
Jeremy Lane
Hon. Leslie Metzen
Sharon Mohr
Sen. Tom Neuville
Hon. Gary Pagliacetti
Amy Rotenberg
Pat Sexton
Dane Smith
Rep. Steve Smith
Virginia Stringer
William Wernz
DePaul Willette
Hon. Bruce Willis

Members Absent:

Felicia Boyd
Karen Janisch
Jeffrey Johnson
Robert Johnson
Hon. Sam Hanson
Cmdr. Bill Martinez
Rep. Steve Simon

Court Services Staff Present:

Kelly Mitchell

I. Next Meetings

The next meetings of the Committee on Rules of the Board on Judicial Standards will be:

Friday, October 12, 2007
10 a.m. to 3 p.m.
Capitol, Room 15

Friday, November 9, 2007
10 a.m. to 3 p.m.
Location TBD

Friday, December 21, 2007
10 a.m. to 3 p.m.
Location TBD

II. Meeting Summary

1. National Perspective on Judicial Complaint and Disciplinary Process. The Chair introduced speaker Cynthia Gray, Director of the Center for Judicial Ethics (Center) at

the American Judicature Society (AJS). Ms. Gray described the Center as a clearinghouse for information on judicial ethics and discipline. Her role is to keep track nationally of all rules, opinions, news stories, etc., related to judicial ethics and discipline. Across all jurisdictions, the commonalities are that the purpose of monitoring judicial conduct is not to punish, but to protect judicial integrity, restore public confidence, and indicate intolerance of unethical behavior. Otherwise the states are very different in terms of the way each state's commission is developed, who serves on it, its source of authority, its procedures, staffing, and sanctions.

Ms Gray recited the following trends. Nationally, in 2006, 12 judges were removed from office, 11 judges resigned, 4 were barred from ever serving in office again, 1 was required to retire, and about 108 were sanctioned. There are probably several hundred private sanctions each year, but she is unable to track that.

With regard to bifurcation of the adjudicatory and investigative processes, Ms. Gray reported that in most states, there is no bifurcation, and in most states where the unified process has been challenged, it has been upheld because the procedure includes an independent review by the state's highest court, and that provides for due process. About 8 states have two completely separate bodies: one conducting the investigation, the other conducting the adjudicatory function.

A more recent trend is for there to be one commission that divides itself into two or more panels. This was first suggested by them American Bar Association (ABA) in 1994, though no state has adopted precisely the method suggested by the ABA. AJS opposed the ABA model rule, citing concern about having only three people conduct the investigation because investigation comprises most of the commission's work and puts a large burden of work on a small number of people. AJS was also concerned there might be inconsistencies in the investigative decisions because different panels of the commission (therefore different people) would be deciding whether to file charges. Thus, a judge who is the subject of a complaint before one panel one month might not get same result in front of the next panel the next month. She also noted that patterns are discerned at the investigative level, so it is important that there be consistency.

Eight states have established bifurcated processes since the ABA proposal was developed. Kansas developed an original approach in which the board divides into two panels: A and B. A meets certain months, B meets the other months. Staff is the same for each. If A decides to file a complaint, B hears the complaint and vice versa. There is still, however, the possibility that the two panels will produce inconsistent results.

A member asked whether other states use a separate panel for factfinding. Ms. Gray responded yes, that is common. In California, for example, there is a body of masters who receive special training so they can better serve on that panel. A member asked whether any states have rules regarding the investigation to address the consistency issue. Ms. Gray responded no, it does not appear so. A member asked whether consistency is a serious concern in any state, or whether it is this just part of the human condition. Ms. Gray responded that there are definitely perceptions that some judges are treated better

than others based on politics, regionalism, etc., and that commissions need to strive to correct that perception wherever possible.

With regard to confidentiality, Ms. Gray stated that in all states, the investigation is confidential. This confidentiality is considered to be important to encourage complainants and witnesses to come forward. Complaints that are dismissed are also confidential; the complainant is informed of the dismissal, but the matter is generally not made public. In all states, the matter becomes public at the filing of formal charges. The hearing is public, and the proceeding before the highest court is public as well. In most states there is an option of private resolution or sanction.

Three states have less confidentiality than other states: Arkansas, New Hampshire, and Arizona. In Arkansas the philosophy is that since judges are elected officials, even dismissal orders are open to the public. The public order does not include details from the complaint, but the decision is public. In New Hampshire once a complaint is dismissed, the complaint, answer, and dismissal are all open to the public. In Arizona all complaints filed against all judges are public except that the judge's name, court, and any other identifying information is redacted. The Arizona commission posts all complaints on its website.

A member asked how much information is given to a judge when a complaint is filed. Ms. Gray responded that in most states, the answer is none because notice is not provided until an investigation has been authorized, and a vast majority of complaints are dismissed prior to that point. If complaints make it past the screening process and more intense investigation takes place, notice is given. She also noted that in a few states, the notice includes the name of complainant, but this process is seldom spelled out in the rules. In Alaska, the complaint form includes a check box asking the complainant if it is okay to provide his or her name to the judge. In Nebraska, the notice of complaint includes a warning to the judge against retaliation.

A member asked whether states distinguish between complaints filed while the judge is currently sitting on the case versus complaints that are filed after the case is finished. Ms. Gray responded that no states have rules addressing that distinction. But in some states, that distinction is one of the things taken into consideration with respect to the timing of investigation. A lot depends on the nature of the complaint. A common problem is that many complainants think that if they file a complaint the judge will have to recuse himself or herself from the case. All states agree a litigant does not get to choose the judge in that manner.

A member asked whether commissions generally disclose board recusals. Ms. Gray responded that in some commissions, members sign the decision so the judge would know those who did not sign were either absent or recused themselves. However, most formal complaints are signed by the chair so there is no way to know. Most states have a disqualification standard (e.g., judge can't sit on panel regarding complaint involving them). Some states appoint alternates so if one commission member cannot sit, the alternate does. This process works well because alternates often become full members,

and by that time have developed experience in the work of the board. It also means the commission does not have to sit short handed; there is always someone to sit in if a member is absent.

Some commissions have ethical guidelines for their members setting forth requirements for attendance, confidentiality, etc. However, there is no real way of enforcing the guidelines.

When asked what commissions do when a judge asks for the process to be public, Ms. Gray responded that most states allow the judge to waive confidentiality. When the complainant publicizes that he or she has filed a complaint, the commission can confirm that an investigation is taking place, describe the process, and affirm the judge's rights. There are two federal decisions stating that the judge has the right to take his or her case public if the judge wants to do so. Disallowing that would be a violation of free speech.

Returning to the issue of bifurcation, Ms. Gray explained that there are two types: bifurcation for investigation and bifurcation for factfinding and development of a record. In bifurcation for investigation, one panel conducts the investigation stages up to the filing of formal charges,and the factfinding is done by the other panel. The decision of the factfinding panel goes to the highest court for review. In bifurcation for factfinding and development of a record, the full commission conducts the investigation, and a separate panel, which may consist of commission members or outsiders, conducts an independent review. Deference may be given to the panel's findings of fact, but there is no deference given to the panel's conclusions of law. However, Ms. Gray was unable to find that any commission had conducted much formal analysis regarding this point.

With regard to private warnings, in most states, if a private warning is opposed, the matter proceeds to formal charges. The rationale for this is that because a private warning is issued without a record, in order for there to be a contest, the record must be developed. A member noted that the lawyer discipline system allows there to be a private hearing to develop a record, and questioned why the same should not be allowed for judges. Ms. Gray responded that her belief is the hearing should be public because, unlike lawyers, judges are elected officials.

Some states have a procedure one step below the private warning: dismissal with caution. The judge does not have the right to contest this. The purpose is to point out to the judge an area of concern; that is, if more conduct like this comes to the attention of the commission, it may result in discipline. States consider this an educational tool. A member commented that the Minnesota rules provide for a private warning based on conduct that *may* be grounds for discipline. This could create a dilemma if the board notices a pattern because the warnings were not proven by clear and convincing evidence, but now that there are one or two more complaints, the board, factfinder, and Supreme Court must decide whether all of the complaints together really establish a pattern that can be proven by clear and convincing evidence. Ms Gray responded that this is an issue that is necessarily out there. It is important for the commission to have dispositional options short of formal charges to be used as educational tools. She noted that most

commissions can reopen a file if there is a pattern of complaints, which would allow for development of the record, and ability to meet the higher proof standard. When asked about the retention standard for dismissals with caution, Ms. Gray responded that they are typically kept for a period of years before destruction, they can be reopened, and they could be made public if a pattern complaint is filed and the dismissals with caution are put together to support the pattern.

A member asked what the usual practice is for handling complaints based on chemical dependency. Ms. Gray responded that she does not have much information about those cases because not many are public. Several states have rules in place that are designed to address the issue as soon as possible so removal of the judge is not the only option. In Pennsylvania, for example, the judge can request diversion. This option gives the judge a chance to go through treatment, during which time the judge is monitored, and the complaint is held in abeyance. Some states treat chemical dependency similarly to mental illness. More commissions are utilizing monitoring.

A member asked how many states have some process where there is Legislative oversight of activities of disciplinary board. Ms. Gray reported that most receive an annual report with bare statistics. She has heard of legislative audits, but they are usually limited to finances and do not delve into the merits of the complaints. She has heard legislators in other states express frustration about the difficulty in overseeing a confidential body. She is not aware of any states that conduct a confidential audit on the merits.

Ms. Gray commented that in some states, judges must make a personal appearance to receive discipline, including a private reprimand. In Florida, for example, the judge must appear before the commission, the decision will be read aloud, and the proceeding will be broadcast on cable. Personal appearance appears to be a very effective form of discipline.

A member asked whether any commissions based the discipline that may be imposed upon the whether the judge *knew* or *should have known* his or her conduct would be a violation of the cannons. Ms. Gray indicated the distinction is sometimes considered a mitigating factor (the judge did not act intentionally).

Ms. Gray closed her remarks by noting the following national trends:

- Some states have sanction guidelines for the commission and the court (i.e., which sanctions can be imposed for what type of conduct). This is helpful to have for consistency.
- Some states include in the annual report for educational purposes a summary of the private warnings issued.
- In most states, if the judge has an inquiry, the judge can ask an advisory committee in writing or orally for advice. The advice is not binding on the court or commission. If judge took the advice and followed it, it is considered good faith if a complaint is filed with the commission regarding that conduct. If the judge did not ask for advice, failure to seek advice might be used against the judge. Most states have advisory committees to which judges can go

prospectively to head off any unethical conduct. In some states a separate committee handles the advisory process. Usually there is no overlap between advisory board and commission though it is often the same staff. Most states do still have staff answering questions as well. Currently, Minnesota's advisory opinions are not public; she recommends that they be made public. In those states in which they are made public, the identity of the judge seeking the advice is kept confidential.

- Establishing quick response teams to handle complaints during elections.

2. Update on Work of the Citizen's Commission for an Impartial Judiciary. Robin Wolpert, Reporter for the Citizen's Commission for an Impartial Judiciary, reported on the discussions and results from the commission. The commission was formed in February 2006, and finished its work in March 2007. It is comprised of a diverse group of citizens from labor, politics, law, and academia. Its purpose was to evaluate the appropriate method of selecting judges in Minnesota in light of the implications of this method on selection of an impartial judiciary. The goal was to promote impartiality and accountability in the judicial system through changes in judicial selection.

Currently, most vacancies are filled by governor appointment. At the appellate court level, most governors have utilized an informal merit-based process though it is not required.

Historically, Minnesota elections are the lowest nationally in terms of cost. Elections in Minnesota are typically not partisan affairs. Candidates do not typically take part in issues debates, and do not engage in fundraising. Nevertheless, the commission determined that impartiality is at risk in the wake of the *White* cases because judicial candidates can now take positions on disputed legal or policy issues, take endorsements from parties and groups, and take positions on platforms. These activities threaten the impartiality of the courts. As a result, judicial campaigns can now look like political campaigns. There is a risk that money interests can influence outcomes, and that partisanship can enter the judicial decision making process, and there is potential for negative television advertisements.

Some of the key statistics that motivated the report were:

- In a Wisconsin Supreme Court race, special interest groups spent $1.7 million in negative television ads.
- In Washington in 2006, $2.7 million was spent the Supreme Court races.
- In West Virginia, $2.8 million was spent on a single race.
- The average cost of winning has jumped over 45% in last 3 years.
- Only Minnesota and North Dakota have remained free of television ads during an election.

The recommendations of the commission are:

1) Make the merit selection process mandatory so that all judges are appointed by the governor, and extend the process to the appellate courts.

2) Develop a comprehensive performance evaluation process occurring midterm and at end of term. The purpose of the midterm evaluation would be to provide feedback for judge. The purpose of the end of term evaluation would be to provide information for voters. The evaluations would be made public and put on the ballot to inform voting.
3) Require retention elections for all judges

Ms. Wolpert then posed several questions that are raised for this committee in a post-*White* era:

- What constitutes judicial misconduct in the new post-*White* era (and how to we define misconduct in the post-*White* world where voters can hold judges accountable for the outcome of their decisions and voters have the power to force judges to consider and respond to public preferences in making judicial decisions?
- Should the board's procedures be changed and should new procedures be created to address post-*White* election scenarios? (It may be important to establish the rules of the game in advance of a crisis, and this may enhance the legitimacy of the board's procedures.)
- What procedures can be established to help the board retain its legitimacy and public confidence in addressing post-*White* election scenarios?
- Should the board assume the role of referee of highly charge partisan campaigns (or will the board be forced to do so)?
- Highly charged, partisan campaigns may produce the following scenarios that may challenge the board's current procedures and the confidentiality of the process:
    - A judicial challenger (or a surrogate or an interest group or political party) may file a complaint against his or her opponent (a sitting judge) – regardless of the merits of the complaint, how should it be handled procedurally?
    - A judicial challenger (or surrogate, etc.) may publicly reveal the existence of a complaint against his or her opponent (a sitting judge) – what are the implications for the board's procedures?
    - How will the board handle press inquiries regarding pending complaints in an election?
    - How will the board publicly explain its mission to the electorate and educate the public about the disciplinary and investigative processes?
    - How will the board explain the balance of due process and accountability for judges?
    - What are the implications for the sitting judge in terms of access to any pending complaint and knowledge of the status and resolution of the complaint?
- Will the board take on the task of insuring that judicial elections do not threaten the due process rights of litigants to a fair day in court or the core functions of the court?
- If a judge adheres to voter preferences in making decisions rather than the rule of law, is there a role for the board?

- As the cost of judicial campaigns sky rockets, pressuring judicial candidates to raise money from the very parties who have cases before them, how will the board address these activities?
- If judicial candidates signal how they will rule to attract electoral support during campaigns, how will the board address this?
- The use of negative television ads as the potential to create the perception and reality that law is a matter of personal preference and politics. Will the board address this?

3. Committee Update. Judge Pagliaccetti informed the committee that he sent the committee's request for access to records of the Board on Judicial Standards to the Supreme Court. Justice Anderson confirmed that the letter had been received and that the Supreme Court also requested and received a response from David Paull, Executive Secretary to the board. Justice Anderson noted that the Court is concerned about the due process implications raised by the request, but stated the Court will carefully review and respond to the request.

It was noted that at least one individual from the public in attendance had materials he or she wanted distributed to the committee. The Chair confirmed that the committee welcomes the submission of comments in writing. Persons wishing to provide materials to the committee should provide them to staff in advance of the meeting and the materials will be distributed.
When questioned about the posting of agendas and minutes on the Judicial Branch website, staff confirmed that agendas and minutes are being posted at the following web address, http://www.mncourts.gov/?page=1962, and that the goal is to post the agenda at least one week before the meeting, and to post the minutes as soon as possible after the meeting, but no later than one week prior to the next meeting.

4. Summary of Comments from Minnesota District Judges Association Conference. Judge Pagliaccetti reported that he and Judge Metzen participated in a panel discussion at the Minnesota District Judges Association Conference (MDJA) regarding the work of this committee. The panel presented an update and general information about the purpose and work of the committee and then opened it up for questions and issues from the judges. Judge Pagliaccetti recalled the top four issues he brought away from the discussion were:
   - Should the adjudicatory and investigative process be bifurcated?
   - Is the complainant identified on the notice sent to the judge, and if so, when does that occur?
   - What is advisory function of the board or Executive Secretary? Judges appeared to know they could call the board for advice, but were not certain whether they could obtain a written opinion.
   - More clarity in rules dealing with due process, which included many of the issues the committee has already discussed and forwarded to complaint subcommittee.

   Judge Metzen added that the other issue for which she received follow up was whether the committee could look at the 90-day rule. It was noted that the 90-day rule issue has been raised in the letters submitted to the committee by Judge Clifford.

5. Complaint Subcommittee Report. Kelly Mitchell reported that the Complaint Subcommittee is in the process of comparing the ABA Model Rules for Judicial Disciplinary Enforcement to the current Minnesota Rules of the Board on Judicial Standards to determine if any of the concepts in the Model Rules should be utilized in the Minnesota Rules. The subcommittee expects to be able to begin reporting proposed rules changes at the November meeting.

6. Mental Illness/Disability Subcommittee Report. Senator Betzold reported on the progress of the Mental Illness/Disability Subcommittee. He noted that most of the Rules of the Board on Judicial Standards are geared toward punitive results, and the mental illness/mental disability rule seems to be an add on. The subcommittee is working on proposed amendments that will bring recognition in the rules that there may be other ways to deal with mental illness and mental disability. The subcommittee is proposing that there be a preliminary investigation to determine whether there is substantial objective evidence of mental incapacity, that the rules separate the issue of mental and physical incompetency from fault and conduct, and that the mental illness/disability category include chemical dependency. Along with that, the subcommittee will be addressing the issue of waiver of medical privilege. He explained the judge should not be placed in the position of waiving medical privilege just because someone said the judge is mentally ill and the judge denies it. The subcommittee is in the process of creating a flow chart to explain its proposals, and will provide that at the October meeting.

7. Confidentiality Subcommittee Report. Judge Willis presented the report and recommendations of the Confidentiality Subcommittee. The subcommittee reviewed the five questions referred to it by the full committee, and came forward with three recommendations: 1) there should be a process for confidential appeal to the Supreme Court of a private admonition; 2) the board should be required to send notice to the judge when it has commenced a formal investigation, and the contents of that notice should be spelled out in the rules; and 3) the judge should be able to request a copy of the complaint if it has been made public and notice has not yet been sent.

A member noted that the committee might want to consider adding a provision to the notice language allowing the board to defer giving notice of the complaint if in the judgment of the board it would hinder the investigation. The committee requested that the rule be redrafted to include that provision.

With regard to assisting the legislature in its oversight role, and providing information to the public, Judge Willis reported that he had talked to David Paull about what information could be provided without breaching the confidentiality provisions of the rules. Even if the committee were to recommend that the board be subject to a regular audit, there is risk that the process will politicize the functioning of the board. Board members might become concerned that their votes will be subject to legislative review, and this could have a chilling effect on their conduct. It was noted that the board is subject to a regular financial audit by the State Auditor.

A member asked whether the ten-day period proposed for giving notice is that long to allow for administrative processing. Judge Willis responded that the ten-day period was taken from the ABA Model Rules; he surmised it was based on administrative concerns. A member asked whether we should consider modifying the proposal to provide that the investigation cannot be commenced until notice is sent. The committee agreed that it should.

Because there are several dependencies between the recommendations of this subcommittee and the Complaint Subcommittee, the full committee decided it would hold the recommendations for approval until they were redrafted as indicated above and until the recommendations came forward from the Complaint Subcommittee.

On a general note, members requested that staff identify amendments on the agenda as action items when it is time to vote on them.

8. Future Agenda Items. Judge Pagliaccetti asked whether the committee had requests for particular agenda items in October. A member asked whether the committee would have an opportunity to discuss the large policy questions posed by Ms. Wolpert. Those questions will be placed on the October agenda.

The committee set meeting dates for November and December. The next three meetings will be scheduled from 10 a.m. to 3 p.m. with the idea that we can end the meeting if the committee finishes its business earlier.

The committee also determined that the best timing for a public forum would be January, when the committee is more likely to have a set of proposed amendments ready for review. Staff will choose some dates and times for consideration by the committee at the next meeting.

APPENDIX G - COMMITTEE REQUEST FOR ACCESS TO BOARD RECORDS

GARY J. PAGLIACCETTI
JUDGE OF THE DISTRICT COURT
SIXTH JUDICIAL DISTRICT
ST LOUIS COUNTY COURT HOUSE
VIRGINIA, MINNESOTA 55792

September 10, 2007

Chief Justice Russell Anderson
Minnesota Supreme Court
25 Rev. Dr. Martin Luther King Blvd
St. Paul, Minnesota 55155

Re: Committee on the Rules of the Board
on Judicial Standards

Dear Chief Justice Anderson,

The Committee on the Rules of the Board on Judicial Standards was established on April 3, 2007 for the purpose of reviewing and recommending proposed changes to the Rules of the Board on Judicial Standards. Since that time, the committee has held several meetings, and has established subcommittees to examine issues in three specific areas: the complaint process, mental illness/disability, and confidentiality.

As the committee has progressed in its work, the members have concluded that it would be helpful for them to have the ability to review a representative sample of the files of the Board on Judicial Standards. Specifically, the committee believes access to the files is important for the following reasons: 1) provide context for their work; 2) provide them with a sense of how the rules are implemented, including how complaints are categorized and which proceed to the investigation stage; 3) understand the nature of communications between the Board, judges, and complainants; 4) aid in determining whether the current model for processing complaints is fair and effective; 5) help determine whether there are problems or issues not adequately addressed by the rules; and 6) furnish committee members who have not served on the Board with some of the background held by committee members who have served on the Board.

On behalf of the Committee on the Rules of the Board on Judicial Standards, I am requesting that the Supreme Court issue an order granting access to a specific set of files for review. To achieve a representative sample of files, the committee suggests that the order define the accessible files as follows:

1) One typical Board agenda and the files that included on the agenda, to be selected by Judge Pagliaccetti, Robert Johnson, and William Wernz;

2) Four cases from each of the Board's categorization level, chosen randomly, with the method of randomness to be determined by Judge Pagliaccetti, Robert Johnson, and William Wernz; and
3) Four complex cases, to be selected by Judge Pagliaccetti, Robert Johnson, and William Wernz.

The committee requests that the following parameters be placed on file access by members of the committee:

1) Access will be limited to the members of the Complaint Process Subcommittee: Annamarie Daley, Robert Johnson, Jeremy Lane, Cmdr. Bill Martinez, Hon. Leslie Metzen, Amy Rotenberg, Pat Sexton, Virginia Stringer, William Wernz, and DePaul Willette.
2) The committee or its subcommittee shall close meetings to the public for purposes of discussing the files.
3) Committee members shall not disclose the contents of the files.

Thank you for your consideration of this request.

Sincerely,

Gary J. Pagliaccetti
Chairman

APPENDIX H - REVISED COMMITTEE REQUEST FOR ACCESS TO BOARD RECORDS

GARY J. PAGLIACCETTI
JUDGE OF THE DISTRICT COURT
SIXTH JUDICIAL DISTRICT
ST. LOUIS COUNTY COURT HOUSE
VIRGINIA, MINNESOTA 55792

November 19, 2007

Chief Justice Russell A. Anderson
Minnesota Supreme Court
25 Rev. Dr. Martin Luther King Jr. Blvd
St. Paul, MN 55155

Re: Advisory Committee on Rules of the Board on Judicial Standards

Dear Chief Justice Anderson:

In September, I contacted you to request that the Supreme Court issue an order granting the Advisory Committee on Rules of the Board on Judicial Standards access to a specific set of the Board's files for review. At the time, it was the committee's belief that access to a sample of files would be important for the following reasons: 1) provide context for their work; 2) provide them with a sense of how the rules are implemented, including how complaints are categorized and which proceed to the investigation stage; 3) understand the nature of communications between the Board, judges, and complainants; 4) aid in determining whether the current model for processing complaints is fair and effective; 5) help determine whether there are problems or issues not adequately addressed by the rules; and 6) furnish committee members who have not served on the Board with some of the background held by committee members who have served on the Board.

Although the committee is nearing the end of its work, as chair of the committee, I have been asked to renew the request for an abbreviated file review. Such a review would still be helpful to the committee because it would serve to validate the committee's recommendations or provide a basis for revising the recommendations before submitting them to the Court.

It is my understanding the Court is reluctant to grant access based on the initial request because to do so would breach the expectations of confidentiality that are so inherent in the rules. Confidentiality is integral to the work of the Board both to protect judges from unfounded accusations, and to encourage individuals to report judicial misconduct without fear of retaliation. To address judicial expectations of confidentiality, the committee proposes that the Court request the Minnesota District Judges Association to ask for volunteers to waive confidentiality for the purpose of this file review, and that the review be confined to files

containing complaints against those judges who have voluntarily waived confidentiality. A copy of a proposed waiver form is attached to this letter. To address complainant expectations of confidentiality, the committee proposes that the names and any identifying information regarding the complainant be redacted. Further, the review shall not include work product of the executive secretary or records of the board's deliberations. To limit the burden of this file review on the current board staff, it is recommended that the review be limited to 10 files.

Additionally, if the file review is granted, the following parameters should be placed on file access by members of the committee:

1) Access will be limited to the following members of the committee: Hon. Gary Pagliaccetti, Sen. Don Betzold, Hon. Leslie Metzen, William Wernz.
2) The committee shall close meetings to the public for purposes of discussing the files.
3) Committee members shall not disclose the contents of the files.

Thank you for your consideration of this request.

Sincerely,

Gary J. Pagliaccetti

WAIVER OF CONFIDENTIALITY AND AUTHORIZATION FOR RELEASE OF INFORMATION

To: Board On Judicial Standards

The Minnesota District Judges Association has requested volunteers to waive confidentiality regarding Board records for the purpose of a file review to be conducted by the Advisory Committee on Rules of the Board on Judicial Standards (Advisory Committee).

In that connection, I hereby waive confidentiality regarding all matters relating to my professional conduct, including but not limited to complaints or disciplinary proceedings in which I have been named, and authorize the Executive Secretary of the Board on Judicial Standards to provide this information for the purpose of the file review.

I understand the file review will be conducted by the following members of the Advisory Committee: Hon. Gary Pagliaccetti, Sen. Don Betzold, Hon. Leslie Metzen, and William Wernz. I further understand the information will be utilized only for the purpose of informing the work of the Advisory Committee, and that such information will be kept in strictest confidence by your office and the individuals conducting the file review.

_____

Name *(Please Print)*

_____ _____

Attorney License Number Date of Birth

_____ _____

Signature Date

APPENDIX I - SUPREME COURT RESPONSE TO COMMITTEE REQUEST FOR ACCESS TO BOARD RECORDS

THE SUPREME COURT OF MINNESOTA
MINNESOTA JUDICIAL CENTER
25 REV. DR. MARTIN LUTHER KING JR. BLVD.
ST. PAUL, MINNESOTA 55155

CHAMBERS OF
RUSSELL A. ANDERSON
CHIEF JUSTICE

(651) 296-3380

December 21, 2007

Hon. Gary J. Pagliaccetti
Sixth Judicial District
St. Louis County Courthouse
Virginia, Minnesota 55792

Re: Request for Access to Files of the Board on Judicial Standards

Dear Judge Pagliaccetti:

I am writing in response to your letters on behalf of the Committee on Rules of the Board on Judicial Standards requesting that the Supreme Court issue an order permitting selected members of the committee to review a sample of the board's confidential complaint files. After fully and carefully considering the matter, including related legal issues and potential ramifications of a positive or negative response, the court has decided to deny the committee's request.

Our primary concern, among others, in evaluating the committee's request has been the effect our response will have on the principle of confidentiality that is a core tenet of the board's processes, as reflected in Rule 5 of the Rules of the Board on Judicial Standards. Rule 5 provides that, subject to specific narrow exceptions, "all proceedings shall be confidential" until a public Formal Complaint is filed with this court, which occurs only after a full investigation and a board finding of sufficient cause to proceed. Because most files do not reach the Formal Complaint stage, they remain confidential under the rules. The board is charged with establishing "procedures for enforcing the confidentiality provided by this rule."

The Rules on Lawyers Professional Responsibility (RLPR) similarly provide for confidentiality. Lawyer discipline files are confidential unless and until they reach a public complaint stage, subject to exceptions to confidentiality in certain specified circumstances. Rule 20(a), RLPR. Those express exceptions include "[w]here permitted by the Court." Rule 20(a)(6), RLPR. Notably, the confidentiality rule of the Rules of the Board on Judicial Standards, Rule 5, does not contain a comparable provision that allows the court to override the confidentiality requirement.

The standard of confidentiality in Rule 5 protects not only judges who are the subjects of complaints, but also those who file complaints and others, such as witnesses, who may become involved in the investigation or complaint process. The principle of confidentiality has created clear expectations of privacy for judges, complainants, and other participants.

Your request seeks to protect the confidentiality interest of judges by proposing that the committee review only files concerning judges who volunteer to waive confidentiality for the purposes of this review. One problem with this approach is that it negates the concept of a random selection of files to be reviewed. More importantly, this approach does not adequately address confidentiality concerns regarding complainants and other participants, and the potential chilling effect opening the files could have on future participation in the board process.

Your committee includes several current and former members of the board. Part of the reason these members were appointed was to serve as a resource to the committee with regard to board functions and practical application of the rules. We believe the committee has benefited by the service of these members. We encourage the committee to continue to move forward with its charge to review and recommend proposed changes to the rules, based on the information and knowledge of the current committee members. We also note your indication that the committee is nearing the end of its work. In these circumstances, the additional information the committee may receive by reviewing a sample of the board's confidential files does not outweigh the potential harm that could result from the breach of confidentiality inherent in that review.

Sincerely,

Russell A. Anderson
Chief Justice

MINNESOTA BOARD ON JUDICIAL STANDARDS

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RANDY R. STAVER
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HAND DELIVERED

June 25, 2008

Hon. Eric J. Magnusen, Chief Justice
Associate Justices, Minnesota Supreme Court
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Re: Statement of the Board on Judicial Standards on the Report of the *Ad Hoc* Advisory Committee to Review the Rules of the Board on Judicial Standards

Dear Chief Justice Magnusen and Associate Justices:

Please permit this letter to serve as the Board's response to the court's order dated April 18, 2008, requesting public comment on the changes to the *Rules of the Board on Judicial Standards (Rules)* proposed by the *Ad Hoc* Advisory Committee to Review the Minnesota Code of Judicial Conduct (Committee), as set forth in a report dated March 14, 2008. Due to their service as members of the Committee, Judge Pagliaccetti and Patrick Sexton did not participate in the discussions of the matters contained in this letter.

The Board specifically extends to the committee members its unanimous appreciation for their dedication and outstanding effort. In the Board's view, the report generally advances, in many ways, the concerns of our statewide community for the continued promotion of professional and ethical standards in the judiciary.

However, the Board does not believe that those proposed modifications referred to specifically in this letter advance the Board's mission and may impair the Board's ability to fulfill its duties and responsibilities. Having experienced many combined years in the field of judicial regulation, the Board has learned that its rules, as well as any proposed changes, must be evaluated on the basis of five guiding criteria:

Access: The Board must be easily accessible to potential complainants. Whether initiated by judges, judicial officers, lawyers, court administrative personnel, court participants or members of the general public, the decision to file a complaint with the Board is often made under a great deal of stress and pressure. Complainants are often concerned about adverse consequences or retaliation, as judges and judicial officers are trusted with great power in our society. This is also a concern for lawyers. Even judicial officers who become complainants can be subjected to pressure from colleagues and others. For this reason, all complainants should be invited easily into the process, minimizing their natural reluctance.

Fairness: Judges and judicial officers are entitled to every reasonable opportunity to fully respond to a complaint. The public, as well as judges and judicial officers, are entitled to a process that functions fairly and effectively.

Protection: Judges and judicial officers must be protected from invalid or non-meritorious complaints. Complainants, witnesses and all other participants, including judicial officers, must be protected from undue duress and retaliation.

Independence: Given the power of judges and judicial officers in our society, Board members perform a most difficult and important task in government. Board members must be protected from any and all outside pressures.

Perspective: Judicial discipline cases are not criminal cases and should not be viewed as such. Although judges or judicial officers may violate the code of ethics when determined to be guilty of a crime, a mere failure to comply with the code of ethics is, in and of itself, not criminal behavior. The canons of ethics are best analogized to employment rules since they only determine whether a judge or judicial officer is personally fit to perform the duties and responsibilities of the judicial office. As the court has stated, when judicial sanctions are imposed, the purpose of the discipline is not to punish, but to protect the public by insuring the integrity of the judicial system. "The sanction must be designed to announce our recognition that misconduct has occurred, and our resolve that similar conduct by this or other judges will not be condoned in the future. We act not to punish the wrongdoer but to restore public confidence in the system and its officers." *In re Miera*, 426 N.W.2d 850, 858 (Minn. 1988).

Efficiency and Economy: The process should be designed to operate efficiently, without undue complication or delay. The public and the judge are entitled to an efficient inquiry and hearing, free of unnecessary technical procedures or potential pitfalls.

As they currently exist, the rules that govern the Board's operations are designed to perform three basic tasks: (1) Evaluate complaints and dismiss those that have no merit; (2) Propose discipline in meritorious cases, seeking the agreement of the judge or judicial officer; (3) Where the judge or judicial officer and the Board do not reach agreement, provide a factual record to the court for the final decision. The Board takes the position that no proposed change should be implemented unless it enhances these basic responsibilities and advances these important purposes. For the reasons stated, the Board recommends that the proposed modifications referred to in this letter should not be adopted.

The Rules Should Continue to Permit the Supreme Court to Review Judicial Disciplinary and Disability Cases *De Novo* - Proposed *Rule 14(f)*.

Pursuant to the current *Rule 10(a)* and *Rule 11(a)*, the three-member panel acts solely as a "factfinder" with the power to make non-binding recommendations. Unless the case is dismissed by the Board after reviewing the panel's proposed findings of fact and recommendations, the matter comes before the court automatically when the Board files the record with its findings of fact and recommendations.

The court does not currently owe any duty of deference with regard to the facts as found by either the panel or the Board. Rather, under *Rule 13(f)*, the Supreme Court reviews "the record of the proceedings on the law and the facts and shall file a written opinion and judgment directing such disciplinary actions as it finds just and proper." In the performance of this duty, the court has the power to accept, reject or modify, in whole or in part, the recommendations of the Board, which in turn holds that same power over the findings of fact and recommendations of the panel under *Rule 11(c)*.

The court has ruled that, pursuant to the current rules, the court "makes an independent review of the evidence in judicial disciplinary proceedings," remaining "sensitive to the fact that the panel had the opportunity to view the witnesses as they testified and is therefore in a superior position to assess credibility." The Supreme Court has held that the panel's main function is "to develop the most complete record possible for consideration by the board and this court." See, generally, *In re Miera*, *Id.* See also, *In re Snyder*, 336 N.W.2d 533, 536 (Minn. 1983) (the court exercising its "authority to independently review the record of the proceedings before the board on the law and on the facts" and reaching factual conclusions); *In re McDonough*, 296 N.W.2d 648, 691 (Minn. 1979) (describing the "particularly zealous study by every member of this court of the record before us, conducted with a heightened awareness of our independent role").

Under the proposed new *Rule 11*, the panel has the power to dismiss the complaint for a lack of "clear and convincing" evidence. If the panel finds that the charges are supported by "clear and convincing" evidence, the panel assesses discipline pursuant to proposed *Rule 11(b)*. Both determinations are binding on the Board. The panel's decision can only be reversed or modified by means of an "appeal" to the Supreme Court.

The Committee specifically proposes to replace the current *Rule 13(f)* with new *Rule 14(f)*. Pursuant to the proposed rule, the duty of the court to "review the record of the proceedings on the law" appears to remain unchanged. However, the proposed rule requires the court give "*deference to the facts*" as found by the panel.

The Board suggests that, to preserve the court's independent role in the processing of complaints in which a judge or judicial officer is alleged to have violated a canon of ethics or is physically or mentally disabled, the proper standard of review is *de novo*. Any requirement that the court provide additional deference to the facts as found by the panel would adversely affect the court's necessary independence and its responsibilities to the public. The panel is accountable to no one. The Supreme Court is accountable to every citizen and must decide these cases in an atmosphere of total independence.

To be effective and respected, the public must be confident in both the system of justice and the fairness of individual judges. Under the present rules, the public's trust and confidence has been growing. See, *Minnesota Court Public Trust and Confidence Survey*, 2007, p. 4. To avoid the erosion of public confidence, judges must ardently avoid both actual improprieties as well as the appearance of impropriety. Judges and judicial officers "must expect to be the subject of constant public scrutiny." In the context of the unique role they play in instilling faith in our system of justice, judges must diligently adhere to a "higher standard of conduct than is expected of lawyer or other persons in a society." See generally, *In re Winton*, 350 N.W.2d 337 (Minn. 1984); ***Minnesota Code on Judicial Conduct (Code)***, *Comments to Section 1A and 2A*.

An ethical complaint against a judge creates an extraordinary proceeding. As a result, the court has always reviewed the record on such cases with extraordinary care. The court's independent power to correct errors of fact and of law should be preserved in order to best achieve the goals as stated in the ***Code***. A review of a case alleging judicial misconduct or disability is too important to our society to be conducted as if as if it was an ordinary appeal. Unlike an ordinary appeal, these cases are not initially decided by an elected constitutional district court judge. Unlike the justices of the Supreme Court, the panel members are not elected, have no constitutional duties and are therefore not directly accountable to the public. The retired judges and the public member of the panel have no more, and perhaps less expertise than do the justices of the Supreme Court. In past cases, panels have made some unexpected recommendations. See, *In re Ginsberg*, 690 N.W.2nd 539 (Minn. 2004) (panel concluded that mental illness excused judicial misconduct); *In re Murphy*, 737 N.W.2nd 355 (Minn. 2007)(panel concluded that the judge did not know the identity of the person who received the traffic citation, although it credited the testimony showing that the judge had been advised of this fact).

The panel's most important duty has always been to conduct the hearing and make the record. The process will work best if the court maintains the tools it needs to continue to make independent decisions.

The Rules Should Not Require the Board to Disclose the Names of Board Members Participating in Formal Action– Proposed *Rule 5(c) and Rule 6(f)(6)*

Under the current and proposed *Rule 5(a)* "all proceedings" before the Board are confidential, "except as otherwise provided in this rule." Proposed *Rules 5(c)* and *6(f)(6)* seek to create two new exceptions to the principle of confidentiality. Proposed *Rules 5(c)* and *6(f)(6)*would require the Board to "disclose the names of the board members who participated" when the Board notifies a complainant of its final action and when notifying a judge that the Board has determined there is cause to proceed.

The principles of confidentiality do not exist solely to protect judges. The rule protects complainants, witnesses and Board members as well. All constituencies benefit from the rule of confidentiality as it applies to Board members. Confidentiality promotes independent action and guards against improper influences.

These proposed disclosures are problematic because they would make it possible to identify the judge members, the lawyer members and the public members who participated in a given action. This informant would tend to single out the Board members and target them as potential recipients of outside pressures from complainants, judges, the general public or other interested parties. As the minority position states, where an action was not participated in by the full board, such disclosure might make it less likely for a judge or judicial officer to accept a sanction or change "errant behavior."

The task of a member of the Board on Judicial Standards is most difficult. The state has many boards and commission that regulate professional conduct for the public benefit. However, only one board regulates the personal conduct of judges and judicial officers, individuals who are among the most powerful and influential in the state. In the past, members have reported on contacts intended as attempts to influence them. The lawyer and judge members of the Board have been especially subject to outside pressures.

It is important that Board members act independently. The adoption of these rules would have an adverse effect on the ability and the perceived ability of Board members to make decisions as free from outside pressures as possible.

The Rules Should Not Require the Board to Grant Personal Appearances Whenever Demanded By Judges or Judicial Officers – *Rules 6(d)(6) and 8(a)(3)*

Under the current rules, a judge or judicial officer may appear before the Board in only one instance. Pursuant to *Rule 7(a)(3)*, a judge may, at his or her option, appear before the Board "in lieu of or in addition to a written response" to a Statement of Charges made pursuant to *Rule 7(a)(1)*.

Although not authorized by a rule, the Board has, over the years, occasionally invited judges and judicial officers to appear. The purpose for this appearance has historically been

to provide the Board an opportunity to obtain additional information or to emphasize what the Board considers to be an important aspect of the ***Code*** or its disciplinary action. Although the Board has on occasion granted requests by judges or judicial officers to appear, such appearances have never been mandated except in the limited circumstances described in *Rule 7(a)(3)*.

Under proposed *Rules 6(d)(6)* and *8(a)(3)*, a judge or a judicial officer has the right to demand an appearance before the Board or a panel of the Board. The request for an appearance must be granted by the Board, even where the judge or judicial officer has filed an answer to a response complaint to a *Rule 8* formal complaint and regardless of whether the Board has determined the need for additional information.

Since one of the appearances could be demanded after the investigation is completed and after a formal charge has been filed, what would the purpose of such a visit be? The appearance could provide an opportunity for the judge or judicial officer to exert undue influence on the Board members. The proposed rules give the Board no choice. Over half of the Board members consist of lawyers of judges, persons who value and depend on collegial relationships with judges. As it considers these rules, the Board asks that the court to consider balancing the need for such mandatory visits with the necessity to preserve and promote Board independence.

Additionally, assuming both demands for an appearance are made by a judge or judicial officer, the proceedings would be significantly extended in time, delaying the final result be a minimum of two and perhaps three meeting periods.

<u>The Rules Should Not Require The Board To Provide Notice to the Judge or Judicial Officer Prior to the Initiation of a Formal Investigation - Proposed *Rules 6(d)(2) and 6(d)(3)*</u>

Under proposed *Rule 6(d)(2)*, the Board must notify a judge or judicial officer that an investigation of his or her conduct has been authorized. Although the judge or judicial officer has 30 days to respond, the Board's notice must be given within 10 days of the authorization. The giving of the notice may be deferred, but only "for extraordinary and specific reasons," pursuant to *Rule 6(d)(3)*.

Pursuant to current *Rule 6(c)*, the Board is authorized to begin an investigation prior to notifying the judge or judicial officer that a complaint has been received. Pursuant to this rule, witnesses are advised that there statements are confidential, unless and until, a formal charge is filed.

Although there is no rule specifically authorizing it, judges and judicial officers are almost always notified that a complaint naming them has been received, once the Board reviews the executive secretary's preliminary evaluation. Typically, the judge or judicial officer is asked to informally respond. The request specifically asks that the judge or judicial officer correct any incorrect facts and provide the Board with their thoughts on the

application of the canons to the conduct. Usually, the decision to conduct a formal investigation is made after this informal process has been completed.

The Board intends to continue to notify judges and judicial officers as soon as possible. There are times, however, when the Board finds it necessary to begin a formal investigation without notifying the judge. Usually, these are cases in which the complainant or group of complainants, or the witnesses, fear retaliation from the judge. The Board is often injected into extremely hostile or tense situations. Complainants and witnesses, which include not only those who have matters before the court, but lawyers and judges, are invariably concerned about the premature disclosure of their identity to the subject of the investigation. Often, the Board is contacted by persons close to the court, such as court administrative staff, probation officers and law enforcement personnel. These groups are highly subject to retaliation and are of great concern to the Board. There is also the concern that the subject of the investigation may attempt to influence the discovery of evidence or witnesses. *In re Murphy, Id.*

For a board that initiates formal investigations in such a large variety of circumstances, this proposed requirement is a very unusual one. The rule of confidentiality should protect every participant in the process equally. The Board asks the court to consider balancing the adoption of this notice requirement with the Board's concerns. In this regard, the Board refers the court to the statements of Cindy Gray, Director of the Center for Judicial Ethics, American Judicature Society. Responding to the committee's inquiry, Ms. Gray commented that "Such extensive, early disclosure is not necessary for the judges' defense . . . Therefore, the only effect of the disclosure will be to discourage complainants and give judges opportunities to retaliate against complainants or witnesses or try to get the to change their stories."

Such retaliatory conduct might certainly constitute "extraordinary and specific reasons" under *Rule 6(d)(3)* However, from practical standpoint, it can be difficult to know what is occurring before the formal investigation actually begins and produces some results. By that time, it might be too late. In such cases, the best way to assure protection against improper conduct is to temporarily delay the disclosure of the identities of complainants and witnesses.

Additionally, judges or judicial officers who prematurely know the name of a complainant or witness might improperly or incorrectly disqualify themselves from presiding over further proceedings. Often, complaints are filed in the mistaken belief that it will provide grounds for the disqualification of the judge. Consistent with advisory opinions issued from all over the United States, the Board has advised that a judge or judicial officer is not required to disqualify themselves "solely on the ground that an attorney or a party has filed an ethical complaint against the judge." Premature notice to the judge or judicial officer could cause an improper disqualification.

The Rules Should Not Limit the Board to 30 Days in the Issuance of Advisory Opinions – Proposed *Rule 2(a)(2)*

In its history, the Board has issued many advisory opinions. For the first time, however, this proposed rule specifically authorizes the Board to do so. The Board believes it is proper for the rules to formally authorize this important aspect of the Board's activities.

The rule provides that an advisory opinion must be issued "with 30 days after receipt of the written request unless the time period is extended by the board." This time period is not realistic. The Board rarely meets every 30 days. Typically, meetings are scheduled for approximately every 5 weeks. Thus, this rule could require that an advisory opinion be issued prior to the time the Board has the opportunity to review it. All constituencies are benefited when the Board has and takes the time to produce advisory opinions that are well considered.

The Board is currently operated by a staff of two – the executive secretary and the executive assistant. The Board's current policy is that in incoming cases have priority over all other work, including advisory opinions. The 30-day limit might be impossible to meet during periods of high volume or if the executive secretary becomes ill or is scheduled to take vacation during the 30 day period. Often, the Board asks the executive secretary to make modifications to a proposed advisory opinion. Occasionally, this process extends over the period of several Board meetings.

So long as the Board's staff is limited by its legislative appropriation, the 30-day time limit should be replaced by a non-specific time limit. The Board has no history of unreasonably delaying the preparation or issuance of advisory opinions. Specifically, the Board suggests that the rule be modified to provide that the "board shall issue a written opinion in a timely manner."

A delay in the issuance of an advisory opinion does not cause a delay in answering the questions of a judicial officer. The executive secretary always informally advises a judge or judicial officer on all inquiries made, prior to the time the Board approves a written advisory. No judge or judicial officer is asked to proceed without an answer merely because a written advisory opinion is pending.

The Rules Should Permit the Board to Propose Discipline for a Single Instance of Incompetence – Proposed *Rule 4(a)(3)*

The proposal is to change "incompetence" as a ground for discipline to a "pattern of incompetence." The term "incompetence," as used in this rule, corresponds to *Canon 3A(2)*, requiring judges to maintain "professional competence" in the law. It appears that the Committee does not believe that a single violation is sufficient to be considered as a violation of the canon, as it limits Board action to a "*pattern* of incompetence in the performance of judicial duties." (emphasis supplied)

Historically, actions that violate this canon include conduct that clearly and fundamentally exceeds judicial authority, such as the denial of a right to notice, the denial of a right to a hearing, the denial of the right to counsel or the abuse of the contempt power. Mere legal error is always distinguishable from this type of conduct and is never disciplined. See, *Rule 4(c)*. The Board believes that, depending on the severity, a single instance of incompetence is sufficient to warrant action.

The Rules Should Not Expand The Board's Jurisdiction – Proposed *Rule 2(d)*

Currently, the Board's jurisdiction terminates in the event a judge or judicial officer resigns or retires, including retirements based on disability. As a result, the Board terminates any investigation or proceeding it is pursuing upon the occurrence of one of these events. The only exception is an active retired judge as selected by the Supreme Court and the ***Code of Judicial Conduct***, *Application Section B*. In this regard, the Board considers itself to have jurisdiction over any judge or judicial officer performing active retired judicial duties.

The proposed rule seeks to extend the Board's jurisdiction over any "inquiry, investigation, or Formal Complaint commenced before a judge left judicial office" except where the Board specifically concludes that "pursuing the matter further is not a prudent use of the board's resources." The proposed rule specifically provides that the "board shall also have jurisdiction over matters of a disability retirement over a retired judge."

The preliminary statement speaks of "continuing the disciplinary process to provide for greater judicial accountability," as well as for the benefit of persons who have been victimized by improper judicial conduct.

Currently, the Lawyers Professional Responsibility Board has jurisdiction over former judges. The state law provides that the Governor or the Supreme Court may grant disability retirements. If a judge or judicial officer commits a crime or a violation of the civil law, the damage is remedied by the pertinent law enforcement agency, a criminal proceeding or a private law suit. All of these agencies have more expertise than the Board in resolving retirement issues.

As the court has noted so often in its cases, the Board exists, not to punish a judge or judicial officer who violates the canons, but to protect and maintain the public's confidence in the judicial system. The canons and the rules are job-oriented, in the sense that they apply to those who are performing the duties of the job. The proposed expansion sounds in punishment, not remediation. Except for the presence of unusual circumstances, the proposal would put pressure on the Board to expend its limited resources on persons who no longer can directly affect the judicial system, ignoring the fact that other agencies and the courts are available to pursue those same issues in a competent and experienced manner. Under the proposal, the Board could not refuse to pursue a specific case without deciding whether it is prudent to do so, engaging the Board in a potential controversy that has little to do with the public's confidence in the judicial system.

Currently, retirement or resignation is considered by the Board to be an appropriate end to cases in which serious misconduct has occurred. The proposed expansion would remove this alternative. If further "accountability or specific redress for improper behavior is desired by the public or the victim," this should be provided by the legal process or agencies with expertise in general accountability or punishment. The Board has done its part to maintain the public's confidence in the judicial system for almost forty years without need of having the power to punish a judge or judicial officer or continue its efforts after resignation or retirement. If judges and judicial officers are to be disciplined after retirement for their conduct, it should be done by an agency that has more traditionally discharged that responsibility. The proposed expansion of jurisdiction would force the Board to play a role the court has never before approved.

The Rules Should Not Permit A Private Admonition to be Reviewed by Former Board Members – Proposed *Rule 7(a)*

Proposed *Rule 7(a)* creates a new committee for the purpose of reviewing any private admonition the Board proposes. Again, an issue of accountability arises. Pursuant to the proposed rule, the members of the three-member committee are randomly selected by the chairperson. In her comments, Ms. Gray stated that such a committee "seems contrary to the statute [Chapter 490A]" because "[N]one of the members of the committee . . . will be appointed by the governor, yet the committee's decision to dismiss a private admonition will be binding on the Board." The Board agrees with Ms. Gray's comments.

Additionally, as stated above, the members of such a panel are accountable to no one. The Board accounts to the Governor and the public. The court is generally accountable to the voters. Given the constitutional and statutory structure that created the Board, it is not appropriate to require that these important duties be delegated to persons other than the Board itself.

The Benefits of Permitting Interrogatories are Outweighed by the Resulting Additional Delays and Expense – Proposed *Rule 9(b)*

Under current rules, Civil Procedure Rule 33 style interrogatories are not permitted. *Rule 9(b)* provides the hearing panel presider to authorize the service of interrogatories upon request of the Board or the judge. The rules have always provided for complete discovery. The Board believes that the utilization of interrogatories in judicial disciplinary cases would not result in any benefit while created the possibility for substantial delays and increased expense.

Finally, the Board wishes me to express their thanks to the court for the opportunity to contribute to this important process.

Yours truly,

David S. Paull
Executive Secretary, on behalf of the
Minnesota Board on Judicial Standards

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June 19, 2008

Hon. Russell A. Anderson, Associate Justice
Hon. Eric J. Magnuson, Chief Justice
Associate Justices, Minnesota Supreme Court
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

RE: Comments of Peter H. Watson, Esq. and Barry Lazarus, Esq. to the *Ad Hoc* Advisory Committee to Review the Proposed Rules of the Board on Judicial Standards ("Board")

Dear Associate Justice Anderson, Chief Justice Magnuson and Associate Justices:

We served as lawyer members of the Minnesota Board on Judicial Standards "Board" as follows:

i Mr. Watson from April 1991 to May 1999, serving vice-chair from December 1998 to May 1999;
ii Mr Lazarus from April 1998 to February 2002, serving as chair from January 2000 to December 2001

We wish to submit our comments to the proposed rule changes based on our collective experience and understanding of the issues and processes which the Board addresses:

1. **Proposed Rule 5(c) and Rule 6(f)(6).** We do not believe it is in the public interest, the interest of the Board, or individual members of the Board, to "disclose the names of Board members who participated" when the Board will proceed to investigate a complaint or is requested to provide an advisory opinion. The Board must speak as an independent entity, whether the full panel participated or only part thereof. We base this conclusion on the following:

a. Disclosures of actions taken by the Board should be neutral and the Board should be viewed as and entity in and of itself. The members who comprise the panel or how he or she voted should not be a consideration or disclosed.

b. As former attorney members of the Board, we believe disclosure of participation would have a chilling effect on an individual member's ability to freely participate in the process and exercise his or her independent judgment. We can say that even without disclosure as to participation, it is never an easy task for a judge or attorney member of the Board to escape the enmity of some judges or judicial officers by serving on the Board. Law firms are concerned some judge's harbor an unstated predjudice against the firm having an attorney member on the board.

c. What is the purpose of the proposed change? This is tantamount to a jury being polled as to its verdict. We do not believe the proposed change will benefit the Board's functions or is in the best interest of the public.

d. The word "participated" is ambiguous. Does this mean participation by individuals who voted, or the names of individuals who were then serving on the panel at that time?

2. **Proposed Rules 6(d)(6) and 8(a)(3).** The solemnity of an appearance before the Board is preserved when a judge or judicial officer is requested by the Board to appear. Allowing an appearance at any time when requested by a judge or judicial officer dilutes the impact of being requested to appear and provides an opportunity to attempt to intimidate Board members. The Board should retain the sole discretion to request an appearance, not vise versa.

3. **Proposed Rule2(a)2.** Our experience, while serving on the Board, indicates the process of issuing an advisory opinion within 30 days is unrealistic. For example, if the request is received shortly before the next scheduled Board meeting, the Executive Secretary may not have time to properly advise the Board on the issues involved. Therefore, the matter would be discussed in the next monthly meeting. Should the Board agree on the content of the advisory opinion, the opinion is not provided to the requesting judge or judicial officer until a few days thereafter.

4. **Proposed Rule 2(d).** We agree with the proposed rule change inasmuch as the public has a right to know what the misfeasance of a judge or judicial officer may be if the conduct is such that public disclosure would be allowed under the rules. A resignation or retirement of a judge or judicial officer should not prevent the Board from its duties to determine whether a violation of the cannons or the rules has or has not occurred. If so, the Board should be able to recommend an appropriate sanction as provided in the rules or find there has been no violation (removing a cloud over the judge's or judicial officer's head).

5. **Proposed Rule7(a).** We oppose proposed Rule 7(a). You cannot be a little bit pregnant. Either you are a duly appointed member of the Board or you are not. If you are not, matters before the Board are to be confidential.

6. **Proposed Rule 9(b).** We oppose proposed Rule 9(b). It is no secret that attorneys "artfully" answer interrogatories in a manner which provides little or no information. This can result at times in motions to compel for a more definite or complete answer. Before which court is this motion to be made? This can create considerable delay which is of benefit to neither the Board nor the party filing the complaint, or the judge or judicial officer.

Thank you for giving our comments your consideration.

Respectfully submitted,

Peter H. Watson

Barry Lazarus

PHW/sa

cc: David Paull, Executive Secretary

MINNESOTA BOARD ON JUDICIAL STANDARDS
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VIA EMAIL & FIRST CLASS MAIL

December 8, 2008

Hon. Eric J. Magnuson, Chief Justice
Associate Justices - Minnesota Supreme Court
25 Rev. Dr. Martin Luther King, Jr. Blvd.
424 Minnesota Judicial Center
St. Paul, MN 55155

Re: Supplementary Comment to the Proposed Modifications to the *Minnesota Code of Judicial Conduct* (*Code*) – *Canon 5A(1)(b)*

Dear Chief Justice Magnuson and Associate Justices:

In its capacity as continuing advisor to the Supreme Court on the proposed changes to the *Code*, the Board has asked me to submit one additional comment. The comment concerns proposed *Rule 4.2(B)(3)*. This rule is proposed as a replacement to *Canon 5A(1)(b)*, as set forth in the current *Code*.

As proposed by the Committee and similar to the current provision, *Rule 4.2(b)(3)* restricts judges and judicial candidates from publicly endorsing or opposing most candidates for public office. However, the rules, as proposed, would permit candidates for judicial office to "publicly endorse or oppose candidates for *the same judicial office* for which he or she is running." (emphasis supplied) This language made its first appearance in American Bar Association's *Model Code of Judicial Conduct*, as revised in 1990. In the 1990 Model Code, the rule was designated as *Canon 5(c)((1)(a)(iv)*.

The effect of the rule, as originally adopted in the *1990 Model Code*, was to prohibit any judge or judicial candidate from endorsing or opposing candidates for public office, with one exception. The exception permitted judges to share campaign literature and other expenses if allowed by their state campaign finance laws. *Rule 4.2(b)(3)*, as proposed by the Committee, would continue this same exception for

judges running for the same office, as adopted in 1990 revision of the Model Code and continued in the 2007 Model Code revision.

Adoption of the "same judicial office" exception, however, would constitute a radical departure from the current Minnesota rule. The "same judicial office" exception was never adopted by the Minnesota Supreme Court. Rather, the Minnesota Supreme Court adopted *Canon 5A(1)(b)*, providing that a judge or judicial candidate may not "publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office." No exception for judges running for the "same judicial office" exists or has ever existed in the Minnesota *Code*.

Because the exception has never been adopted, Minnesota judges and judicial candidates may not share campaign literature or other campaign expenses. In 1998, the Board issued an advisory opinion consistent with *Canon 5A(1)(b)*, concluding that it is improper for incumbent judges to share office space or office expenses with another judicial candidate because "the arrangement implies a mutuality of purpose that could be viewed by the public as mutual endorsement." *Advisory Opinion, Minnesota Board on Judicial Standards (May 26, 1998)*. The Board has consistently enforced this rule since the advisory was first issued.

In adopting the more restrictive rule, the Minnesota Supreme Court indicated its support for the generally accepted rationale for the restriction. At the heart of the rule is the concept that the public endorsement of candidates by judges creates an appearance that the endorsing judge is inappropriately using the prestige of the judicial office. The question is whether or not the independence, integrity and impartiality of the judicial office is advanced or diminished by such activity. The answer in Minnesota has always been that a judge does not advance the public's confidence in the judiciary by taking sides in a political contest. In her recent article soon to be published in the next issue of the *ABA Journal*, 4th District Judge Cara Lee Neville stated writes:

> Lending one's name to further the political ambitions of another diminishes the judicial office. Others have pointed out that such endorsements are also in direct conflict with the independence and impartiality required of the judiciary. The third branch is called upon thousands of times daily around the country at all levels to judge the other two branches. The courts routinely must determine whether members of the other two branches are complying with the Law; for instance, motions to find laws passed by the legislature unconstitutional are heard daily. The courts also must rule upon cases brought by or against office holders in the executive branch, such as the police, district attorney, attorney general and executive agencies dealing with health and human services, pollution control,

> etc. By virtue of their positions, these elected officials, their agencies or agents, are all parties who are constant litigants before the courts. Endorsing candidates for elective office can therefore call into questions the judge's impartiality of bias for or against a particular party, as well raising questions about the independence of the third branch. One could predict the litigant coming to court facing one of the elected officials, their agencies or agents which the judge just endorsed holding little confidence or trust that the judge will not favor the endorsee, thus putting them at a distinct disadvantage before the start! The shear volume of such cases makes the use of recusal unworkable and would cause a hardship to the efficiency of the courts. (Cited with permission)

The drafters of the Model Code created the exception in the belief that judges displaying electoral support for each other did not create the same conflicts or the separation of powers problems meant to be avoided by *Rule 4.1(A)*. However, the Minnesota Supreme Court has never joined in this belief.

The Board recommends that it not do so. The main reasons for the rule, preventing an appearance that the judicial office is misused and diminishment in the public's perception of the judiciary, are not ameliorated merely because both candidates are judges. Like any election contest, judicial campaigns and elections are governed by state law. Court cases raising disputed elections based on these laws are common.

The Board takes the position that these considerations are even more important in judicial races. Based on our collective national experience and the recent news from several neighboring states, the Board believes that challenges in the Minnesota state courts based on state election laws or federal constitutional principles are very likely to substantially increase in the near future. In a recent Wisconsin election, support of a candidate for the Court of Appeals became an issue among the incumbent judges on the court. Several judges endorsed the candidate and several expressed opposition. This could not have occurred in Minnesota, at least under the current rule.

Moreover, the rule appears to favor incumbent judge candidates by providing an opportunity to share expenses and resources with other judges, an option not open to

candidates who are not incumbents. The Board concludes that there is no rational basis for such a distinction, subjecting the rule to a possibly successful court challenge.

The Board appreciates the opportunity to have its recommendation considered and looks forward to any questions or requests for further information you may have.

Yours truly,

David S. Paull
Executive Secretary