STATE OF MINNESOTA

IN SUPREME COURT

HEARING ON PROPOSED AMENDMENTS TO COURT RULES ON PROFESSIONAL RESPONSIBILITY AND CODE OF PROFESSIONAL RESPONSIBILITY

IT IS HEREBY ORDERED, that a hearing be held before this Court in the Supreme Court, State Capitol Building, Saint Paul, Minnesota, on Friday, September 10, 1976, at 10 a.m. on the following matters:

(1) The proposed amendments to the Court Rules on Professional Responsibility recommended by the Lawyers Professional Responsibility Board and endorsed by the Minnesota State Bar Association at its convention on June 18, 1976, together with possible further recommendations of the Lawyers Professional Responsibility Board in light of Laws 1976, Chapter 304, section 4.

(2) The proposed amendment to the Minnesota Code of Professional Responsibility recommended by the Lawyers Professional Responsibility Board and endorsed by the Minnesota State Bar Association, to add the following as DR 9-103:

"DR 9-103 REQUIRED BOOKS AND RECORDS; REQUIRED CERTIFICATE

"(A) Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis books and records sufficient to demonstrate income derived from, and expenses related to, his private practice of law, and to establish compliance with DR 9-102. The books and records shall be preserved for at least six years following the end of the taxable year to which they relate or, as to books and records relating to funds or property of clients, for at least six years after completion of the employment to which they relate.

"(B) Every lawyer subject to DR 9-103(A) shall certify, in connection with the annual renewal of his registration and in such form as the Clerk of the Supreme Court may prescribe, that he or his law firm maintains books and records as required by DR 9-103(A)."

(3) The proposed amendment to the Minnesota Code of Professional Responsibility, recommended by the Lawyers Professional Responsibility Board, to adopt therein:

(a) The amendments to DR 2-105(A)(1) and 2-108(B) adopted on February 24, 1970 by the American Bar Association, and

(b) The amendments to DR 5-105(A), (B), (D), 7-102(B)(1), 7-110(A), (B)(4), and 8-103 and EC 2-18 and 7-34 adopted effective March 1, 1974 by the American Bar Association.

IT IS FURTHER ORDERED, that t-

following be made available upon r

their names with the Clerk of this Co

such copies and who have paid the speci

of providing the copies: Proposed Amen

fessional Responsibility, $6.30; Specified Amer

Code of Professional Responsibility Amendments, 90 ce nts.

IT IS FURTHER ORDERBD, that advance notice of the hearing be given by publication of this Order once in the Supreme Court Edition of FINANCE & COMMERCE and THE ST. PAUL LEGAL LEDGER.

IT IS FURTHER ORDERED, THat interested persons show cause, if any they have, why the proposed amendments should or should not be adopted. All persons desiring to be heard shall file briefs or petitions setting forth their views and shall also notify the Clerk of the Supreme Court in writing on or before September 1, 1976, of their desire to be heard on the proposed amendments.

DATED: July 1st, 1976.

BY THE COURT:

Robert J. Sheran
Chief Justice

SUPREME COURT
FILED
JUL 2 1976
JOHN McCARTHY
CLERK

STATE OF MINNESOTA
IN SUPREME COURT
No. 45298

In the Matter of Petition
of the Minnesota State Bar
Association, a Corporation,
for Adoption of Rules Relating
to Continuing Legal Education

MEMORANDUM OF LAW

MAY IT PLEASE THE COURT:

1. The principal purpose of this memorandum is to demonstrate why this Court lacks jurisdiction to grant the requests of the Petition of the Minnesota State Bar Association, for want of due process in service thereof upon members of the Bar of this State. Trusting that the gentlemen and gentlewomen of the Minnesota Bar and this Court shall resolve this matter amicably among themselves, consistant with the requirements of the Minnesota and United States Constitutions, Counter-petitioner makes this appearance. In addition to the question of jurisdiction, preliminary attention shall be given to the substantive merits of several objections raised in the Counter-petition. The Court is assured of the constructive purposes of Counter-petitioner, who stands ready to provide enthusiastic assistance in the development of responsible educational alternatives.

A. THE COURT LACKS JURISDICTION FOR WANT OF DUE PROCESS

2. A license to practice law is sometimes said not to be property, but a privilege or franchise. See, e.g., In re Petition for Integrated Bar, 216 Minn. 195 at 200, 12 N.W. 2d 515 (1943). Yet if the matter be considered more closely, it is clear enough that such statements can become the instruments of incalculable mischief. A workable definition of property is "the legal relations between persons with respect to a thing," be it "an object having physical existence," or "any kind of intangible such as a patent or a chose in action." American Law Institute, Restatement of Property, 1936 Ed., Vol. 1, p. 3. A patent is a valuable franchise, the abuse of which may result in loss of at least equitable, if not legal protection, and hence practical divestiture; yet for all that, a patent is still property. A license to practice law is likewise a franchise of considerable worth to him who holds it:

abuse thereof may result in suspension or revocation; yet the same holds for a fee simple defeasible, which most certainly is property. True, a license to practice law cannot be alienated; yet, some proprietary estates cannot be alienated, for example, within time periods not reached by the common law rule against perpetuities, or by operation of spendthrift provisions in trust instruments. And, if a mere debt based on an oral transaction is property with situs and other characteristics sufficient to the attached in a suit quasi in rem, Harris v. Balk, 198 U. S. 215 (1908); or if marriage is a thing subject to suit in rem, Sheridan v. Sheridan, 213 Minn. 24, 4 N. W. 2d 785 (1942); then a license to practice law is a form of property subject to suit in rem for some purposes -- and as such, it may not be cancelled, abridged, divested, suspended, or modified without due process of law. Article I, Section 7 of the Minnesota Constitution of 1974; Amendment XIV, Section I of the United States Constituion.

3. Although members of the bar are not judicial magistrates for purposes of the constitutional principle of separation of powers, they are officers of the courts having potent rights and significant responsibilities, they are a privileged class of citizens learned in the law whose status continues during good behavior and cannot be divested save for the weightiest cause. Sir Wm. Blackstone, Commentaries on the Laws of England, 1765 Ed., Vol. 3, pp. 25-29; In re Greathouse, 189 Minn. 51 at 53-54, 248 N. W. 735 (1933). While attorneys are accountable to the courts, judges are accountable to the bar, the people, and the legislature. Article VI, Sections 5, 7 and 8, and Article VIII, Sections 2, 3, 4 and 5 of the Minnesota Constitution of 1974. It is therefore fair to observe that the juxtaposition of lawyers and courts in the judicial process is comparable to the juxtaposition of the house and senate in the legislative process.

In contrast to the State Bar, the state bar association is a mere private corporation, exists independent of its membership, and does not represent all the lawyers of Minnesota. Nor does it have a special status in this Court. The state bar association, as a private party, has no more or less a right to petition this Court than any other statutory corporation. In this proceeding, the state bar association, as Petitioner,

seeks a court order requiring all lawyers admitted to practice to pay an additional registration fee, and take courses of instruction at considerable personal expense, or else face proceedings for contempt, disbarment, or suspension. Plainly, this amounts to litigation sui generis, the object of which is to place additional encumberances on attorneys' licenses, which are property for purposes of jurisdiction and due process. It is a proceeding in rem as surely as an action to quiet title to real estate.

4. It was once thought to be constitutionally permissible to use constructive service by publication in proceedings in rem or quasi in rem, Pennoyer v. Neff, 95 U.S. 714 (1878). Evidently, Petitioner thought that mere nominal publication in an obscure newspaper would be sufficient notice of the hearing held on October 10, 1974, to invoke the in rem jurisdiction of this Court.

Through the news media, Counter-petitoner learned of the determination of the state bar association, at its annual convention this past summer, to insitute this proceeding. While Counter-petitioner was personally opposed to the proposed program, he naturally assumed that, at least as a matter of professional courtesy, if not common law custom and constitutional due process, the state bar association would take proper steps to provide adequate notice -- notice calculated to provide an opportunity of defense -- for all concerned. It was not until Counter-petitioner was casually informed by a state bar association employee on November 6, 1974, that he learned of the notice given by publication, and the hearing held almost a month previous. Struck with disbelief at this move, Counter-petitioner wrote the Clerk of this Court. See Exhibit A hereof. Mr. McCarthy was kind enough to respond by letter of November 20, 1974. See Exhibit B hereof. Meanwhile, Counter-petitioner has conferred with several of his colleagues, who were unaware of this clasdestine lawsuit against them by the state bar association: a number of them were astonished. Lawyers throughout this State have since been notified by mail of the $30.00 assessment for 1975 requested by Petitioner.

The manner in which this has been done is most unsatisfactory, for not only does it lack simple courtesy, but it is manifestly an attempted

deprivation of liberty and property without due process of law. The mere gesture of general notice by publication is no longer adequate in proceedings in rem. The best possible notice must be given: that means personal service within the State where possible; and personal service, or at least publication and service by mail, outside the State for persons whose whereabouts are known, etc. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); M.R. Civ. P., Rules 4.03 and 4.04.

The Court therefore lacks jurisdiction to act upon the requests of Petitioner.

B. THE COURT LACKS SUBSTANTIVE POWER TO GRANT THE PETITION; IN ANY EVENT, THE PROPOSAL IS UNWISE

5. It would appear that Petitioner believes the Court has inherent power, as a judicial body, to regiment lawyers into study of specific subjects prescribed by a committee controlled by the state bar association, at considerable personal expense; and to pay an occupation tax covering costs of administration. See Exhibit A attached to the Petition, Proposed Rule 2, and Exhibit B attached to the Petition, Proposed Amended Rule 2 (3). Petitioner has presented no evidence of the need for compulsory legal education of attorneys in practice. Nor could the need be proved. The prospectus of the state bar association (Exhibit C of the Petition) simply presumes the need, and then continues with several pages of double-talk. In a fair hearing, Counter-petitioner and his colleagues of like mind would establish that the members of the state bar association committee responsible for the prospectus have neither the experience, nor the evidence, to judge the ability of their fellow lawyers. They cannot even give a sensible definition of competence, and do not understand the problem.

6. The power of common law courts to remove or suspend attorneys from practice depends on a finding of immoral, dishonorable, or criminal conduct, upon notice and hearing, after the fact. Ex Parte Garland, 4 Wall. 333 at 379 (U.S. 1866); In re McDonald, 204 Minn. 61 at 64, 282 N. W. 677 (1938). Counter-petitioner has been unable to find a case where disbarment or suspension was used to remedy incompetence; but, supposing the power to exist for the sake of discussion, the incompetence

would have to be proved with evidence after the fact, not vacuously assumed, beforehand. And, unwillingness or refusal to take courses of study prescribed by a committee controlled by bas association politicians is no proof of incompetence. A lawyer invests years of his life in exhausting undergraduate and postgraduate study to earn his degrees. Then he must pass a rigorous examination to be admitted to the bar, and thereby to become "learned in the law" in the usual acceptation of that phrase. But with practice, his education really begins, for it is not humanly possible to run an honest, reasonably profitable practice without hours of study each week to supplement practical acumen in human affairs wrought by experience. And no committee bureacrat, who thinks in generalities, is any position to tell a lawyer dealing with specific problems how much and what he needs to study.

7. The judges have some power to regulate the conduct of attorneys in furtherance of the administration of justice. Yet, this inherent power of common law courts has a natural limit, which Chief Justice Roger B. Taney described when he said, "...it is the duty of the court to... regulate by sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained... as the rights and dignity of the court itself." Ex Parte Secombe, 19 How. 9 at 13 (U. S. 1856).

Hence this Court does not have power to integrate, or otherwise regulate the Bar of this State, if the proposed order "would result in regimentation of the bar, in its control by small groups and cliques; and in the elimination of that independence of thought and action which has always characterized members of the legal profession." In re Petition for Integrated Bar, supra, 216 Minn. at 201; petition dismissed, 226 Minn. 578.

It is vastly important that the bar be independent of the bench, because the division and balance of power between and within the several levels and branches of government is the best antedote to the abuse of power known in the science of politics. So long as contraposed institutions, such as the bench and bar, are fairly equal, each will tend to stay within its proper sphere. But if the balance be upset, so as to give one institution momentum and advantage over another, there

power becomes intoxicating, and atocracy reigns until the trend is reversed. It is the law which ordains the proper power balance of institutions. Hence the apt aphorism carved in stone above the entry-way of the Chamber of this Court, "Where law ends, tyranny begins." The state bar association has come into this Court, claiming near unanimity of support for their proposal, and tempting the Justices to reach for awesome power over practicing lawyers. Counter-petitioner appreciates that the offer of power to any civil magistrate is great enticement, which only the wisest, soberest, and strongest men in government are able to refuse. And he asks the Court: if the lawyers of this State really supported the program petitioned for, why should the state bar association have come here without giving the lawyers notice reasonably calculated to afford a chance to defend? And, why should the state bar association seek to control the accreditation committee? Since when has a private corporation the right to run things for this Court?. Counter-petitioner believes that the state bar association offers power which the spirit of the law forbids.

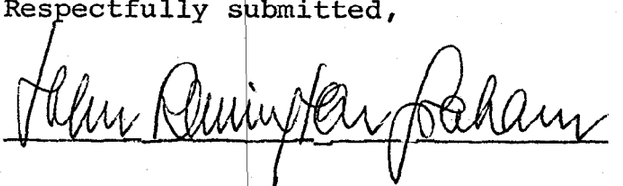
Counter-petitioner counsels the Court to eschew the temptation for the greater glory of the law. For the proposed accreditation committee, would not only be controlled by bar association activists, but would have unfettered power to approve only such courses as large firms could reasonably afford, to force lawyers not to study what they wish by requiring them to study what the bar association wishes, to refuse accredition of courses taught by lawyers with unorthodox ideas, to drive free-spirited lone practitioners out of business by unduly increasing their overhead, to approve only courses which are organs of bar association propoganda, to create a parasitical bureaucracy, etc. Moreover, an effective voluntary program has every incentive to become excellent: otherwise, it would not survive. A compulsory program need not be good to survive; and as quality decreases, resentment and drugery will displace love of the law, which is the sole cause of excellence in our profession.

The great flaw in the proposal of the state bar association is the underlying premise that mature men and women are not able to run their own

study habits adequately without the guidance of a self-annointed elite -- that competence can be produced by coercion. This kind of thinking lacks perspective, earthy common sense, and the serenity of good humor. Sometimes, we lawyers and judges take ourselves too seriously, and are inclined to attept more regulation than spontaneity and freedom in life can endure.

Counter-petitioner mentions other objections in passing, viz., that the proposal petitioned for calls for exercise of legislative power, including taxation, by the judiciary, contrary to the principle of separation of powers; the promulgation of retroactive regulation constituting a divestiture of liberty and property without due process of law, and an ex post facto law, which points can be argued more fully after appropriate notice to Counter-petitioner's fellows at the bar has been given.

Respectfully submitted,



Minnesota State Bar Association

100 MINNESOTA FEDERAL BUILDING • MINNEAPOLIS, MINNESOTA 55402 • PHONE: 612—335-1183

DAVID C. DONNELLY, *President*
W-1781 First National Bank Bldg.
St. Paul, MN 55101
(612) 227-7271

July 29, 1976

Mr. John McCarthy
Clerk of the Minnesota Supreme Court
State Capitol Building
Saint Paul, Minnesota 55155

Re: Amendments to Court Rules
Your File 46994

Dear Sir:

We enclose and herewith file the Petition of the Minnesota State Bar Association. Your file will disclose Chief Justice Sheran on July 1, 1976 issued an Order for Hearing and for publication with reference to the amendments included upon the enclosed Petition and other amendments. Therefore, we assume that since a hearing has been set for September 10, publication having been already arranged through your office that no further order is required in the premises.

Very truly yours,

DAVID C. DONNELLY
President

DCD:jae

Enclosures

(3)

STATE OF MINNESOTA

IN SUPREME COURT

PROPOSED AMENDMENTS TO COURT RULES ON PROFESSIONAL RESPONSIBILITY AND CODE OF PROFESSIONAL RESPONSIBILITY	46994 PETITION

THE MINNESOTA STATE BAR ASSOCIATION hereby petitions the Court to adopt:

(1) The proposed amendments on file herein to the Court Rules on Professional Responsibility recommended by the Lawyers Professional Responsibility Board which proposed amendments were duly endorsed by the Minnesota State Bar Association at its convention on June 18, 1976, and

(2) The proposed amendment to the Minnesota Code of Professional Responsibility, recommended by the Lawyers Professional Responsibility Board which amendment was duly endorsed by the Minnesota State Bar Association at its convention on June 18, 1976, to add the following as DR 9-103:

> "DR 9-103 REQUIRED BOOKS AND RECORDS; REQUIRED CERTIFICATE
> "(A) Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis books and records sufficient to demonstrate income derived from, and expenses related to, his private practice of law, and to establish compliance with DR 9-102. The books and records shall be preserved for at least six years following the end of the taxable year to which they relate or, as to books and records relating to funds or property of clients, for at least six years after completion of the employment to which they relate.
> "(B) Every lawyer subject to DR 9-103(A) shall certify, in connection with the annual renewal of his registration and in such forms as the Clerk of the Supreme Court may prescribe, that he or his law firm maintains books and records as required by DR 9-103(A)."

Respectfully submitted,

By _____
David C. Donnelly
President

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

On this 29th day of July, 1976, before me, a Notary Public in and for said state and county, personally appeared David C. Donnelly, to me personally known, who being duly sworn did state that he is the President of the Minnesota State Bar Association, a Minnesota corporation and that he is duly authorized to sign this Petition on its behalf.

_____
Notary Public

JUDITH A. EVERTS
Notary Public, Ramsey County, Minn.
My Commission Expires Dec. 8, 1977

E.M. See me 5

Received 9/1/76

Minnesota State Bar Association

100 MINNESOTA FEDERAL BUILDING • MINNEAPOLIS, MINNESOTA 55402 • PHONE: 612–335-1183

DAVID C. DONNELLY, *President*
W-1781 First National Bank Bldg.
St. Paul, MN 55101
(612) 227-7271

August 26, 1976

Honorable John McCarthy
Clerk, Minnesota Supreme Court
State Capitol Building
Saint Paul, Minnesota 55155

Re: Your File 46994
Amendments to Rules and Code
of Professional Responsibility

Dear Sir:

The Court by its Order dated July 1, 1976, has set the above-entitled matter for hearing at 10:00 a.m., Friday, September 10, 1976. It is the purpose of this letter to learn whether or not your file shows all prerequisites have been met for this court hearing.

There are three general categories of subject matter that are involved: 1) Amendments to the court rules on professional responsibility - which in effect completely revises the present rules, 2) an amendment to the Minnesota Code relating to required books and records kept by lawyers, 3) further amendments to the Minnesota Code based upon American Bar Association recommendation of February 24, 1970 and March 1, 1974.

On July 30, the Minnesota State Bar Association filed with the Court a Petition for the adoption of numbers one and two above. Number three was not included in this petition because the Bar Assoication has never taken action upon it. This is not to be considered as opposition. However, it does lead me to inquire whether or not there is, or should be a petition in support of adopting item three above.

I also inquire whether the court rules have been met in that a sufficient number of copies of the text of each proposal is on file and whether publication requirements have been met. Further, I would appreciate being informed of the filing of any other petition bearing upon the September 10 hearing.

No, they haven't petitioned, but not compulsory available

At the hearing I shall appear as president of the petitioner, the Minnesota State Bar Association. Other appearances will be:

10 minutes apiece

Kenneth W. Anderson, Chairman, Minnesota State Board of Professional Responsibility, speaking in suppose of item one.

Gerald E. Magnuson, board member, speaking in support of item two.

Professor Kenneth F. Kirwin, board member, speaking in support of item three.

Mr. R. Walter Bachman, Administrative Director, will also appear.

We would appreciate information upon the total time allowed in support of the proposals in order that we may allocate it as among the foregoing appearances.

Very truly yours,

DAVID C. DONNELLY
President

DCD:jae

cc: Mr. Kenneth W. Anderson
Mr. R. Walter Bachman
Professor Kenneth F. Kirwin
Mr. Gerald A. Magnuson
Mr. Gerald A. Regnier

OFFICE OF THE CLERK

Supreme Court of Minnesota

St. Paul, Minn.

JOHN McCARTHY
CLERK
WAYNE TSCHIMPERLE
DEPUTY

September 3, 1976

Mr. David Donnelly
W-1781 First National Bank Bldg.
St. Paul, Minnesota

Dear Mr. Donnelly:

Amendments to Rules and Code of
Professional Responsibility, 46994

This letter replies to your letter of August 26. With respect to item 3, which you delineated as "further amenddments to the Minnesota Code based upon American Bar Association recommendation of February 24, 1970 and March 1, 1974," no supportive petition of its adoption has been filed. Such filing is optional but certainly not compulsory.

Sufficient copies of the text of each proposal are on file, and the publication requirements, as enunciated by the court, have been met. Expressed differently, the order for hearing has been published, and the items furnished our office by Professor Kirwin are available to prospective purchasers.

I am sure the court does not want you to skamp on time. Besides the participants mentioned in your letter, Jack Nordby, a representative from the Sixth District Bar Association, and James Lund have also expressed a desire to be heard. At this juncture, there may be several others. The hearing starts at 10:00 a. m. Within this context, I suggest that you take any time you need to make your presentations since I am certain that the court will be very receptive to anything which you may say. With kind wishes,

Yours sincerely,

John McCarthy

John McCarthy, Clerk

cc: Eric Magnuson
Chief Justice Sheran

Prof. Resp., Code
(Proposed Amendments - Hearing 9/10/76)

LAW OFFICES
JAMES B. LUND
1426 SOO LINE BUILDING
105 SOUTH FIFTH STREET
MINNEAPOLIS, MINNESOTA 55402
TELEPHONE (612) 333-5467

Clerk of Minnesota Supreme Court

James B. Lund desires to be heard in opposition to DR 9-103, except as to trust accounting.

Please supply copies set forth in order.

Respectfully submitted,

James B. Lund

Aug. 31, 1976

CHIEF JUSTICE SHERAN

(4)

LAW OFFICES
McLEAN, PETERSON, SULLIVAN & HAUGH
CHARTERED

EDWARD D. McLEAN
CHARLES T. PETERSON
THOMAS R. SULLIVAN
HOWARD F. HAUGH

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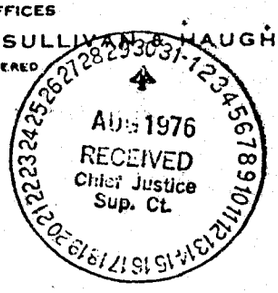

August 27, 1976

Chief Justice Robert J. Sheran
Supreme Court
State of Minnesota
St. Paul, Minnesota 55101

Re: Proposed Minnesota Rules on
Lawyers Professional Responsibility

46994

Dear Chief Justice Sheran:

On behalf of the members of the Sixth District Bar Association, I am enclosing herewith an explanatory memorandum and amended proposed Minnesota Rules on Lawyers Professional Responsibility. Copies of this material have been furnished to Mr. Walter Bachman and the proposed amendments to the rules have been furnished to and discussed with Ken Anderson and some of the other members of the Board.

The Sixth District Bar Association hereby requests the opportunity to send a representative to appear at the hearing before the Court on September 10, 1976. It is anticipated that ten minutes will allow us sufficient time to state our position and answer a few questions.

I had originally planned to be personally present at the hearing to relate a personal experience which is illustrative of the type of situation about which the members of our Bar Association are most concerned. Because of a conflict I will be unable to attend the hearing but I would like to relate the incident in this letter. In July of this year a complaint against me was filed with the State Board of Professional Responsibility. I was accused of having hypnotized a client. Mr. Bachman, the administrator, notified me that the complaint had been filed and requested that I respond to him. Mr. Bachman also indicated that he did not intend to turn over the matter to the local ethics committee for any action. Following my response, Mr. Bachman wrote me to say that the matter was going to be dropped with no further action. Had such a series of events occurred at a time when the new proposed rules were in effect, the complainant could have notified our local newspaper that a complaint had been filed against me for unprofessional conduct and requested that the newspaper verify that fact with the administrator of the State Board of Professional Responsibility. Under the new rules, the administrator, after having received the complaint and before having any opportunity to check its veracity, could have disclosed to the press that a complaint had been filed. The local newspaper could have then printed a news article that a complaint had been filed against me for unprofessional conduct

and that fact had been verified by the State Board of Professional Responsibility. No matter what ultimate disposition was made on the complaint, the damage would have been done to my reputation in the community and I would be prevented, by the immunity provision of the new rules, from suing the complainant for having made a false complaint.

I have discussed my concern about these rules with Ken Anderson, Chairman of the State Board of Professional Responsibility, and one of his responses is that the man who occupies the position of administrator will have discretion as to whether or not he discloses that a complaint has been filed or that an investigation is underway in any particular case. Personally, I believe that I should not have to depend upon the discretion of any particular individual, but rather I should have protection of a written rule. Rule by law as opposed to rule by man has stood the test of time.

I am confident that all of the members of the Court will give their most serious consideration to the content of the rules as they are finally adopted. I appreciate the need for the revision of the rules in light of the problems which the Board has exerpienced over the past few years. I sincerely hope, however, that the proposed rules will not be adopted verbatim because I believe they represent an over-reaction to the problems and tend to minimize and take away the rights of innocent lawyers who may be unjustly accused. Thank you for your patience and consideration in this matter.

Yours very truly,

Thomas R. Sullivan

Encl.

TRS/dso

cc: Mr. R. Walter Bachman, Jr.
Administrative Director
Lawyers Professional Responsibility Board
200 Minnesota State Bank Building
200 South Robert Street
St. Paul, Minnesota 55107

TO: HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE MINNESOTA SUPREME COURT

Re: Minnesota Rules on Lawyers Professional Responsibility

On behalf of the Sixth District Bar Association, a committee was appointed for the purpose of examining the proposed new rules for professional responsibility. That committee drafted its proposed amendments which were presented to the Sixth District Bar Association on May 20, 1976 and were overwhelmingly approved. The attached copy of those amendments are similar to statutory amendments in that the underlined portions are new and the interlineated portions are deleted.

The purpose of this memorandum is to summarize the proposed changes.

First, under proposed rules 6, 20 and 21, it is felt that it was possible for a person to make a completely false, malicious and spurious complaint against a lawyer and the fact that the lawyer was being investigated could be disclosed to the media by the State Director. For those lawyers practicing in small communities a news article which states in effect that lawyer X is being investigated for unprofessional conduct, and this fact has been confirmed by the State Director of Professional Responsibility, could have disastrous results. The provisions which would allow that to occur coupled with the complete privilege provision would leave a lawyer virtually helpless to defend himself in spite of the fact that he might be completely innocent.

Modifications were also made to insure that any lawyer against whom a complaint has been filed or who is being investigated without a complaint, would be immediately notified. (See rule 6b) The original rules were not clear as to when the lawyer complained of would receive notification that he was under investigation or that a complaint had been filed against him.

Under Rule 8 the original rules provided that the State Director had the power to investigate any lawyer in that state with or without a complaint. We feel that placing such unrestricted power in the State Director is not warranted. Our first option therefore would be to eliminate that provision completely. Failing that, we believe that Option B should be the language added to insure that a lawyer being investigated by the State Director without a complaint would receive notification.

Under Rule 20 (confidentiality), (a) (5) and (a) (6) were eliminated because we were uncertain as to the meaning and scope of the provisions. Under 20 (b) we feel that, in general, matters should remain confidential until after there has been a hearing. However, the one exception would authorize the Director to disclose that a lawyer previously convicted of crime, is or is not being investigated.

Under Rule 21 the desire of the committee to protect complainants from threats or suits by lawyers was respected. Rule 21 provides that the complaint, charge or any other statements relating to the complaint or charge made to the Directors or employees are completely privileged and cannot be a basis for liability in any civil lawsuit. Under Rule 6 paragraph (c) was added to clarify the problem of attorney-client confidentiality as it is established by statute and case law in Minnesota.

These amendments were drafted without taking into consideration Minnesota Statute 418.15, Subd. 3 which was approved by the Legislature April 13, 1976.

Committee on Amendments for Professional Responsibility, Sixth District Bar Association

MINNESOTA RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

RULE 1. DEFINITIONS. As used in these Rules:

(1) "Board" means the Lawyers Professional Responsibility Board.

(2) "Chairman" means the Chairman of the Board.

(2-A) "Complaint" means a written statement signed by the complainant.

(3) "Director" means the Director of Lawyers Professional Responsibility.

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

(5) "District Chairman" means the Chairman of a District Bar Association's Ethics Committee who shall be a lawyer.

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

(7) "Notify" means to give personal written notice or to mail to the person at his last known address or the address maintained on this Court's attorney registration records.

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

RULE 2. PURPOSE. It is of primary importance to the public and to the members of the Bar that complaints of lawyers' alleged unprofessional conduct be promptly investigated and disposed of and that disciplinary proceedings be brought in those cases where investigation discloses it is warranted. Such investigations and proceedings shall be conducted in accordance with these Rules.

RULE 3. DISTRICT ETHICS COMMITTEE

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

(1) A Chairman appointed by this Court for such time as it designates and serving at the pleasure of this Court but not more than six years as Chairman; and

(2) Four or more persons whom the District Bar Association (or, upon failure thereof, this Court) may appoint to three-year terms except that shorter terms shall be used where necessary to assure that approximately one-third of all terms expire annually. No person may serve more than two three-year terms, in addition to any additional shorter term for which he was originally appointed and any period served as District Chairman.

At least 20 percent of each District Committee's members shall be nonlawyers.

(b) Duties. The District Committee shall investigate complaints of lawyers' alleged unprofessional conduct and make reports and recommendations thereon as provided in these Rules. It shall meet at least annually and from time to time as required. ~~The District Chairman shall prepare and submit an annual report and such other reports as the Director may require.~~

RULE 4. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

(a) Composition. The Board shall consist of:

(1) A Chairman appointed by this Court for such time as it designates and serving at the pleasure of this Court but not more than six years as Chairman; and

(2) Fifteen lawyers having their principal office in this state, nine of whom the Minnesota State Bar Association may nominate, and six nonlawyers resident in this State, all appointed by this Court to three-year terms except that shorter terms sahll be used where necessary to assure that one-third of all terms expire each February 1. No person may serve more than two three-year terms, in addition to any additional shorter term for which he was originally appointed and any period served as Chairman.

(b) Compensation. The Chairman and other members shall serve without compensation but shall be paid their reasonable and necessary expenses incurred in the performance of their duties.

(c) Duties. The Board shall have general supervisory authority over the administration of these Rules, shall advise and assist the Director in the performance of his dutes, and may, from time to time, issue opinions on questions of professional conduct. The Board may elect a Vice-Chairman and specify his duties, and may elect an Executive Committee and authorize it to perform specified duties of the Board between Board meetings.

(d) Panels. The Chairman shall divide the Board into three Panels, each consisting of five lawyer members and two nonlawyer members. The Chairman or the Vice-Chairman, if any, is a Panel member at any Panel proceeding he attends. Any five Panel members shall constitute a quorum. If a quorum cannot be obtained the Director may assign other Board members for the particular matter. A Panel may refer any matter before it to the full Board.

(e) Assignment to Panels. The Director shall assign matters to Panels in rotation.

(f) Approval of petitions. Except as ordered by this Court, no petition for disciplinary action shall be filed with this Court without the approval of a Panel of the Board.

RULE 5. DIRECTOR

(a) Appointment. The Director shall be appointed by and serve at the pleasure of this Court, and shall be paid such salary as this Court shall fix.

(b) Duties. The Director shall be responsible and accountable to this Court and, unless this Court otherwise directs, to the Board, for the proper administration of these Rules.

(c) Employees. The Director when authorized by this Court and on this Court's behalf may employ persons at such compensation as this Court may approve.

RULE 6. COMPLAINTS

(a) Investigation. All complaints of lawyers' alleged unprofessional conduct shall be investigated pursuant to these Rules.

(b) Notification; referral. If a complaint of a lawyer's alleged unprofessional conduct is submitted to a District Committee, the District Chairman promptly shall notify the Director, and the lawyer so charged, of its pendency. The notification shall include the complainant's name, address, and the substance of the complaint.

If a complaint is submitted to the Director, he shall refer it for investigation to the District Committee of the district where the lawyer has his principal office unless he determines to investigate it without referral, and shall in either instance notify the lawyer so charged of the name and address of the complainant

and the substance of the complaint.

(c) A complaint by a client shall waive the attorney-client privilege with regard to the matter complained of. In all other instances a written waiver of the attorney-client privilege shall be obtained from the client involved.

RULE 7. DISTRICT COMMITTEE INVESTIGATION

(a) Assignment, assistance. The District Chairman may investigate or assign investigation of the complaint to any of the Committee's members, and may request the Director's assistance in making the investigation. The District Chairman may request some or all Committee members to consider the matter.

(b) Report. The District Chairman or his designee shall report the results of the investigation to the Director. The report shall include a recommendation that the Director:

(1) Determine that discipline is not warranted;

(2) Issue a private warning;

(3) Refer the matter to a Panel, either with or without a recommendation as to the matter's ultimate disposition;

(4) Investigate the matter further; or

(5) Dismiss the complaint.

(c) Time. The investigation shall be completed and the report made promptly and, in any event, within 45 days after the District Committee received the complaint, unless good cause exists. If the report is not made within 45 days, the District Chairman or his designee within that time shall notify the Director of the reasons for the delay. The Director may grant additional time or remove the matter from the District Committee.

~~(d) Removal. The Director may at any time and for any reason~~

~~remove a complaint from a District Committee's consideration by notifying the District Chairman of the removal.~~

RULE 8. NOTICE TO COMPLAINANT: INVESTIGATION; DISPOSITION

(a) Notice to complainant. The Director shall keep the complainant advised of the progress of the proceedings and shall appropriately notify him of each stage of the proceedings, including:

(1) Receipt of the complaint by a District Committee or the Director;

(2) Notification of reasons for delay under Rule 7(c);

(3) Removal of a complaint under Rule 7(d); and

(4) Receipt of a report under Rule 7(b).

Option A. ~~(b) Initiating investigation. At any time, with or without a complaint or a District Committee's report, the Director may make such investigation as he deems appropriate as to the conduct of any lawyer or lawyers.~~

Option B. (b) If such investigation is without a Complaint or a District Committee's report, the Director, prior to commencing such investigation, shall file with the lawyer being investigated and the Chairman of the District Committee, a written statement setting out the name of the lawyer and the substance of the matter being investigated. Such Chairman of the District Committee shall, unless the matter under investigation results in a Complaint under Rule 6, or is referred to the District Committee for investigation or consideration under Rule 7, keep in confidence the fact that the lawyer is being investigated. (In no event shall the Director violate or attempt to violate any lawyer-client privilege existing between the lawyer being investigated and the client.)

At the time of initiation of any investigation, with or without a complaint, the Director shall notify the lawyer so involved of the name and address of the complainant, if any, and the substance of the complaint or allegation.

(c) Disposition

(1) Determination discipline not warranted. If, in a matter where there has been a complaint, the Director concludes that discipline is not warranted he shall so notify the lawyer involved, the complainant, and the Chairman of the District Committee, if any, that has considered the complaint. The notification may set forth an explanation of the Director's conclusion. The notification to the lawyer shall set forth the complainant's identity and the complaint's substance.

(2) Warning. If in any matter, with or without a complaint, the Director concludes that a lawyer's conduct does not warrant discipline but warrants a warning, he shall notify the lawyer of the warning and that:

(i) The warning is in lieu of the Director's presenting charges of unprofessional conduct to a Panel,

(ii) The lawyer may within a specified reasonable time demand that the Director so present the charges, and

(iii) Unless the lawyer so demands the Director after that time will notify the complainant, if any, and the Chairman of the District Committee, if any, that has considered the complaint, that the Director has issued the warning.

(3) Submission to Panel. If in any matter, with or

without a complaint, the Director concludes that discipline is warranted, or if the lawyer makes a demand under Rule 8(c)(2)(ii), then the Director shall, if possible contact the lawyer to determine whether he desires to admit any charges. The lawyer may:

(i) Admit some or all charges, or

(ii) Tender an admission of some or all charges conditioned upon a stated disposition.

In the event the lawyer declines to admit some or all of the charges or in the event the Director is unable to contact the lawyer, then the Director shall submit the matter to a Panel under Rule 9.

RULE 9. PANEL PROCEEDINGS

(a) Charges; setting hearing. If the matter is to be submitted to a Panel, the Director shall prepare charges of unprofessional conduct, set a time and place for a hearing by a Panel on the charges, and notify the lawyer of the charges and hearing and of the lawyer's right to be heard at the hearing. The Director shall also notify the complainant, if any, of the hearing's time and place.

(b) Subpoenas. At the instance of the Director or the lawyer, attendance of witnesses and production of documentary or tangible evidence shall be compelled as provided in Rule 45, Rules of Civil Procedure. The District Court of the District where the hearing will be held shall have jurisdiction over issuance of subpoenas, motions respecting subpoenas, motions to compel witnesses to testify or give evidence, and determinations of claims of privilege.

~~(c)--Admission-of-charges.---The-Director-shall,-if-possible, contact-the-lawyer-to-determine-whether-he-desires-to-admit-any charges.---The-lawyer-may:~~

~~(1)--Admit-some-or-all-charges,-or~~

~~(2)--Tender-an-admission-of-some-or-all-charges-conditioned-upon-a-disposition.~~

(d) Conditional stay. The Panel may, if the Director and the lawyer agree, consent to hold the proceedings in abeyance for a specified period and thereafter discontinue them, provided the lawyer throughout the period complies with specified reasonable conditions.

(e) Disposition. After hearing, the Panel shall either:

(1) Determine that discipline is not warranted;

(2) Instruct the Director to give a warning;

(3) Make a finding of unprofessional conduct and issue a reprimand; or

(4) Instruct the Director to file in this Court a petition for disciplinary action, either with or without a recommendation as to the matter's ultimate disposition.

(e) Notification. The Director shall notify the lawyer, the complainant, if any, and the District Committee, if any, that has considered the complaint, of the Panel's action under subdivision (d) or (e).

RULE 10. PROCEDURE UPON ADMISSION OF CHARGES. If the Panel so instructs, the Director shall file a petition for disciplinary action together with the lawyer's admission of charges or tender of conditional admission. This Court may act thereon with or without

any of the procedures under Rules 12, 13, or 14. If this Court rejects a tender of conditional admission, the matter may be remanded to the same or a different Panel.

RULE 11. RESIGNATION. This Court may at any time, with or without a hearing and with any conditions it may deem appropriate, grant or deny a lawyer's request to resign from the bar.

RULE 12. PETITION FOR DISCIPLINARY ACTION

(a) Petition. When so directed by a Panel or by this Court the Director shall file with this Court a petition for disciplinary action. The petition shall set forth the unprofessional conduct charged.

(b) Service. The Director shall cause the petition to be served upon the respondent in the same manner as a summons in a civil action. If the respondent has a duly appointed resident guardian or conservator service shall be made thereupon in like manner.

(c) Respondent not found

(1) Suspension. If the respondent cannot be found in the state, the Director shall mail a copy of the petition to the respondent's last known address and file an affidavit of mailing with this Court. Thereafter the Director may apply to this Court for an order suspending the respondent from the practice of law. A copy of the order, when made and filed, shall be mailed to each district court judge of this state. Within one year after the order is filed, the respondent may move this Court for a vacation of the order of sus-

pension and for leave to answer the petition for disciplinary action.

(2) Order to show cause. If the respondent does not so move, the Director shall petition this Court for an order directing the respondent to show cause to this Court why appropriate disciplinary action should not be taken. The order to show cause shall be returnable not sooner than 20 days after service. The order may be served on the respondent by publishing it once each week for three weeks in the regular issue of a qualified newspaper published in the county in this state in which the respondent was last known to practice or reside. The service shall be deemed complete 21 days after the first publication. Personal service of the order without the state, proved by the affidavit of the person making the service, sworn to before a person authorized to administer an oath, shall have the same effect as service by publication. Proof of service shall be filed with this Court. If the respondent fails to respond to the order to show cause, this Court may proceed under Rule 15.

RULE 13. ANSWER TO PETITION FOR DISCIPLINARY ACTION

(a) Filing. Within 20 days after service of the petition, the respondent shall file in duplicate in this Court an answer. The answer may deny or admit any accusations or state any defense, privilege, or matter in mitigation.

(b) Conditional admission. The answer may tender an admission of some or all accusations conditioned upon a stated disposition.

(c) Failure to file. If the respondent fails to file an

answer within the time provided or any extension of time this Court may grant, the petition's allegations shall be deemed admitted and this Court may proceed under Rule 15.

RULE 14. HEARING ON PETITION FOR DISCIPLINARY ACTION

(a) Referee. This Court may appoint a referee with directions to hear and report the evidence submitted for or against the petition for disciplinary action.

(b) Conduct of hearing before referee. Unless this Court otherwise directs, the hearing shall be conducted in accordance with the rules of civil procedure applicable to district courts and the referee shall have all the powers of a district court judge.

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

(d) Referee's findings, conclusions, and recommendations. The referee shall make findings of fact, conclusions, and recommendations, file them with this Court, and notify the respondent and Director or them. Unless the respondent or Director within five days of receipt of notification orders a transcript and so notifies this Court, the findings of fact and conclusions shall be conclusive. One ordering a transcript shall make satisfactory arrangements with the reporter for his payment. The reporter shall complete the transcript within 30 days.

(e) Hearing before Court. This Court within ten days of the filing of the referee's findings, conclusions, and recommendations, shall set a time for hearing before this Court. The order shall specify times for briefs and oral arguments. The matter shall be heard upon the record, briefs, and arguments.

RULE 15. DISPOSITION: PROTECTION OF CLIENTS

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

(1) Disbar the lawyer;

(2) Suspend him indefinitely or for a stated period of time;

(3) Place him on a probationary status for a stated period, or until further order of this Court, with such conditions as this Court may specify and to be supervised by the Director;

(4) Reprimand him;

(5) Make such other disposition as this Court deems appropriate; or

(6) Dismiss the petition for disciplinary action.

(b) Protection of clients. When a lawyer is disciplined or permitted to resign, this Court may issue orders as may be appropriate for the protection of clients or other persons.

RULE 16. TEMPORARY SUSPENSION PENDING DISCIPLINARY PROCEEDINGS

(a) Petition for temporary suspension. Whenever it appears that a continuation of a lawyer's authority to practice law pending final determination of disciplinary proceedings may result in substantial risk of injury to the public, the Director, on direction of a Panel, shall file with this Court a petition for suspension of the lawyer pending final determination of disciplinary proceedings. The petition shall set forth facts as may constitute grounds for the suspension and may be supported by a transcript of any evidence taken by the Panel, court records, documents or

affidavits.

(b) Service. The Director shall cause the petition to be served upon the lawyer in the same manner as a petition for disciplinary action.

(c) Answer. Within 20 days after service of the petition or such shorter time as this Court may order, the lawyer shall file in duplicate in this Court an answer to the petition for temporary suspension. If he fails to do so within that time or any extension of time this Court may grant, the petition's allegations shall be deemed admitted and this Court may enter an order suspending the lawyer pending final determination of disciplinary proceedings. The answer may be supported by a transcript of any evidence taken by the Panel, court records, documents, or affidavits.

(d) Hearing; disposition. If this Court after hearing finds a continuation of the lawyer's authority to practice law may result in risk of injury to the public, it may enter an order suspending the lawyer pending final determination of disciplinary proceedings.

RULE 17. FELONY CONVICTION

(a) Non-final conviction. Whenever a lawyer is convicted, other than upon his plea of guilty or nolo contendere, of a felony under Minnesota statute or of a crime under the laws of the United States, any state or territory thereof, or any foreign country, punishable by incarceration for more than one year, the Director shall investigate and determine whether a continuation of the lawyer's authority to practice law pending final determination of disciplinary proceedings may result in risk of injury to

the public. If he determines in the affirmative, he shall proceed under Rule 16. If he determines in the negative, he shall so notify the Board.

(b) Final conviction. Whenever a lawyer is convicted, upon his plea of guilty or nolo contendere or upon a judgment not subject to direct appellate review, of an offense specified in Rule 17(a), the Director shall investigate and submit the matter to a Panel under Rule 9. If appropriate, he shall also proceed under Rule 16.

(c) Other cases. Nothing in this Rule precludes disciplinary proceedings, where appropriate, in case of conviction of an offense not punishable by incarceration for more than one year or in case of unprofessional conduct for which there has been no criminal conviction or for which a criminal conviction is subject to appellate review.

RULE 18. REINSTATEMENT

(a) Petition for reinstatement. A suspended, disbarred, or resigned lawyer's petition for reinstatement to practice law shall be served upon the Director and the president of the State Bar Association. The original petition, with proof of service, and one copy, shall then be filed with this Court.

(b) Investigation; report. The Director shall investigate and report his conclusions to a Panel.

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

(d) Hearing before Court. There shall be a hearing before

this Court on the petition unless otherwise ordered by this Court. This Court may appoint a referee. If a referee is appointed, the same procedure shall be followed as under Rule 14.

RULE 19. EFFECT OF PREVIOUS PROCEEDINGS

(a) Criminal conviction. A lawyer's criminal conviction in any jurisdiction, ~~even~~ if upon a plea of nolo contendere or subject to appellate review, is, in proceedings under these Rules, prima facie evidence that he committed the conduct for which he was convicted.

(b) Disciplinary proceedings

(1) Conduct previously considered. Proceedings under these Rules may be based in part upon conduct considered in previous lawyer disciplinary proceedings of any jurisdiction, ~~even~~ if it was determined in the previous proceedings that discipline was ~~not~~ warranted or ~~that~~ if the previous proceedings ~~should be~~ were discontinued after the lawyer's compliance with conditions.

(2) Previous finding. A finding by a Panel or equivalent or by a court in the previous proceedings that a lawyer committed conduct warranting reprimand, probation, suspension, disbarment, or equivalent is, in proceedings under these Rules, prima facie evidence that he committed ~~the~~ that conduct.

(3) Previous discipline. The fact that the lawyer received reprimand, probation, suspension, disbarment, or equivalent in the previous proceedings is admissible in evidence in proceedings under these Rules.

(c) Stipulation. Unless the referee or this Court otherwise directs or the stipulation otherwise provides, a stipulation before a Panel remains in effect at subsequent proceedings regarding the same matter before the referee or this Court.

RULE 20. CONFIDENTIALITY

(a) General rule. The files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of a lawyer, shall be deemed confidential and shall not be disclosed, except:

(1) As between the Committees, Board, and Director in furtherance of their duties;

(2) In proceedings before a referee or this Court under Rules 10 through 18;

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

(4) Upon request of the lawyer affected~~;~~.

(5) ~~Where permitted by this Court; or~~

(6) ~~Where required or permitted by these Rules.~~

(b) Special matters. ~~The following may be disclosed:~~

(1) After a criminal conviction, the fact that a ~~matter~~ lawyer is or is not being investigated or considered by the Committee, Director, or Panel~~;~~ may be disclosed.

~~(2) The fact that the Director has determined that discipline is not warranted, including the fact, if applicable,~~

~~that a warning was given under Rule 8(c)(2);~~

~~(3) The Panel's disposition under Rule 9(d) or (e);~~

~~(4) The Director's determination under Rule 17(a); or~~

~~(5) The Panel's disposition upon a matter submitted to it under Rule 17(b).~~

(2) After a hearing under Rule 9, the disposition of the matter may be disclosed.

(c) Referee or Court proceedings. Except as ordered by the referee or this Court, the files, records, and proceedings before a referee or this Court under Rules 10 through 18 are not confidential.

RULE 21. PRIVILEGE. A complaint or charge, or statement relating to a complaint or charge, of a lawyer's alleged unprofessional conduct, made in proceedings under these Rules ~~or~~ to the Director or a person employed thereby or to a District Committee, the Board or this Court, or any member thereof, is absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person who made the complaint, charge, or statement.

RULE 22. PAYMENT OF EXPENSES. Payment of necessary expenses of the Director and the Board and its members incurred from time to time and certified to this Court as having been incurred in the performance of their duties under these Rules and the compensation of the Director and persons employed by him under these Rules shall be made upon vouchers approved by this Court from its funds now or

hereafter to be deposited to its credit with the State of Minnesota or elsewhere.

RULE 23. SUPPLEMENTAL RULES. The Board and each District Committee may adopt rules and regulations, not inconsistent with these Rules, governing the conduct of business and performance of their duties.