SUPPLEMENTAL STATEMENT ON THE REPORT OF THE SUPREME COURT ADVISORY COMMITTEE ON LAWYER DISCIPLINE

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I. INTRODUCTION

Following my original statement to the Court, the Advisory Committee as well as the Lawyers Professional Responsibility Board filed statements. The board pointed out that it had been asked to make recommendations on any matters "insofar as they were not covered by the report." Board, p. 4.

The board reported that it agreed with the Advisory Committee report "that there is a need to increase both the monitoring and the controls on certain excercises of the Director's authority and discretion." Board, p. 8. This may be an implicit agreement with the Advisory Committee's report which stated, p. 13:

> The Committee understood one of the principal reasons for its formation to be the perception of possible unfairness regarding the discipline system held by a significant segment of the bar. This perception was reaffirmed by testimony received during the Committee's deliberations.

One of the problems broached by the Board's brief, p. 28, is the development of a wide variety of standards because of the various independently operating panels. This is a very serious problem and will be addressed later as I discuss the various rules themselves, but it must be pointed out that one of the purposes of the legislative actions, and the Court here is acting in a legislative capacity, is the need under the due process of law to create standards which limit and control the proceedings before a panel.

The Board acknowledges that under the present system, "the under utilization of Board members is a genuine problem

* * *." Board, p. 38. This is consistent with the Advisory Committee report, p. 54, which indicated that "* * * some Board members indicated their belief that the current rules under utilized members' talents and experience." The statistics seem to bear out the assertion that the Board members have been under utilized. It is therefore apparent that if the Board members be under utilized, there is at least a likelihood that the attorneys under investigation are not the full causes for delay. The Board inappropriately cites in quoting from In Re Smith, 220 Minn. 197, 19 N.W.2d 324, 326 (1945) that the licensed as an attorney is to be "recommended to the public as a trustworthy person fit to be consulted in matters of confidence." That quotation was taken out of context, for that was a case involving an application for readmission. My original exceptions briefly listed the constitutional right to practice law. Foley Brief pp. 2-6. Most attorneys would concede that the burden on a lawyer for readmission after disbarment is much higher than either to be admitted to practice before the bar of the court or to be the subject of a discipline investigation.

One of the problems in the arguments made both by the Advisory Committee and by the Board is the problem of time lapses by the responding attorneys and the structural makeup without discussing the essence of procedural due process of law.

For instance, the Board seems to lament that "* * * some respondents escape discipline altogether after Panel hearings." Board, p. 38. That is the purpose of the Panel hearings, and the Panel is performing within its delegated duties when it finds no

probable cause when under the facts and law applicable, there is no probable cause. This is not a system that is designed solely to ratify the Director's allegations, and it would be a frustration of due process of law for the Panel merely to agree with the Director.

The Board complains about the pre-petition delay because until there is a finding of probable cause, the Director cannot inform the public of "any questions of the lawyer's trustworthiness." Board, p. 34. That seems reasonable because until that time, there has been no finding of probable cause. We need not delegate to the Director the power to make unilateral, _ex parte_ determinations of the untrustworthiness of lawyers. There is no demonstrable public damage being performed in Minnesota by a scrupulous adherence to due process of law.

The Board complains about the Advisory Committee report recommendations 41 and 43, with reference to "highly critical" statements and a "needed check on prosecutorial authority." Board, p. 39. The Board rhetorically makes this argument:

> Put more directly, is there a single case or a single count in any case, resulting from the Director making charges without Panel approval, that has in fact been frivolous, unfair or damaging?

What this argumentative question is designed to produce is difficult to say, but it seems to suggest that the Director will not make mistakes or that some Director may never come along with an arrogant, arbitrary, or incompetent quality. If this argument were extended, we could argue that there is no need for any procedures other than the Director's conclusions. We could

eliminate the Panels, the Board, and the Supreme Court and rely upon the Director's good judgment. Because ours is not a system that functions on an unregulated, subjective determination of an administrator, the court has wisely written in procedural safeguard.

This Court has held that "the observance of the constitutional 'due process' requirement is as important in administrative law as elsewhere * * *." Juster Bro., Inc. v. Chriscgau, 214 Minn. 108, 7 N.W.2d 501, 507 (1943). The United States Supreme Court commenting on due process, has stated, in Fuentes v. Shevin, 407 U.S. 67, 90, 92 S.Ct. 1983, 1999, (1972) that:

> Procedural due process is not intended to promote efficiency or accomodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

Due process "* * * requires that disbarment or suspension proceedings be preceded by adequate notice and an opportunity to prepare a defense." Nell v. United States, 450 F.2d 1090, 1093 (4th Cir. 1971).

The constitutional right to practice law is deeply ingrained in the American legal system.

The federal courts have authority to review state court rules and procedures. Taylor v. Kentucky State Bar Association, 424 F.2d 478 (6th Cir. 1970). There is no essential deference by the federal courts to the state courts in determining the constitutionality of lawyer's discipline rules. Rapp v. The Committee on Professional Ethics and Conduct, 504 Fed. Supp. 1092

(D. C. Iowa 1980). Although the federal courts may defer to the state courts, on ongoing state proceedings regarding attorney's discipline, Middle-Sex County Ethics Committee v. Garden State Bar Association, 457 U.S. 427, 102 S.Ct. 2515 (1982), the court later held, in an opinion by Justice O'Connor that there is no need to defer to a state interpretation of a statute when it is not fairly subject to the interpretation which would make the federal constitutional question unnecessary to resolve. Hawaii Housing Authority v. Midkiff, ____ U.S. _____, 104 S.Ct. 2321 (1984). Thus it is that the attorney's right to practice is grounded on the United States Constitution; and that predicate requires a scrupulous care in the drawing, and more particularly in the redrafting, of procedural rules.

The court should be reminded that in its recent order, June 13, 1985, by which the court created the rules of professional conduct, the court ordered at the same time the repeal of the Minnesota Code of Professional Responsibility and did not include any savings clause. That issue is being presented to this court by me in other proceedings, but the issue of creation and repeal and the possibility of an adverse retroactive effect which may invalidate a proposed rule is not to be entirely discounted. Along that line, Rule 6.4, Rules of Professional Conduct, provides:

> A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration not withstanding that the reform may affect the interest of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in

which the lawyer participates, the lawyer shall disclose the fact but need not identify the client.

While I have a question as to whether I am a director, officer, or member of an organization involved in reform of the law, inasmuch as I am not making this statement as a member of the Minnesota Bar Association -- and I do not belong to the ABA -- but rather as a lawyer admitted to practice before the bar of this court, I may not have to make this disclosure that reforms involved in the rules on lawyer's professional responsibility may affect a client. However, I make that disclosure despite the fact that I might legitimately advise a client who is an attorney that this does seem to conflict with the absolute free speech provisions of the First Amendment to the United States Constitution.

The Court should keep in mind what was stated in Wisconsin v. Constantineau, 400 U.S. 433, 437 91 S.Ct. 507, 510 (1971):

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, due process guarantees must scrupulously be observed.

Reasonably specific standards are required as a matter of due process. This court held as much in Lee v. Delmont, 228 Minn. 101, 36 N.W.2d 530, 538 (1949). See also, Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

We ought not to proceed with considerations of renovating lawyer's discipline procedures with the attitude that

lawyers practice law only with the permission of the court. The court cannot arbitrarily deny admission, Willnar v. Committee on Character and Fitness, 373 U.S. 96, 102, 83 S.Ct. 1175, 1180 (1963) nor can it ignore due process of law in the disciplining of lawyers. Zauderer v. Office of Disciplinary Council, ____ U.S. ____, 104 S.Ct. 2265 (1985).

II. RULE 7 SHOULD BE AMENDED TO PROTECT THE RIGHTS OF THE ATTORNEY

Rule 7, Rules on Lawyer's Professional Responsibility, provides that the district chair or the investigator assigned complaints may report the results to the director with a recommendation for discipline, no discipline, further investigation, or reference to a panel. The matter must be completed within 45 days.

The Advisory Committee recommended, No. 53, that the attorney undergoing investigation should be given specific notice of the "disciplinary rule or ethical consideration" allegedly violated. Of course, we have since repealed the discipline rules, and there are no ethical considerations in the new rules. However, this principle should be applied to the rules of professional conduct in the comments following each of the rules. The Board stated,

> Respondents should be made aware which disciplinary rule violations have apparently been alleged at the District Ethics Committee level after the respondent has replied to the initial complaint. P. 29.

In a recent decision, the Minnesota Court of Appeals pointed out that once rights are established, they '* * * cannot

be taken away without the occurrence of a contested case hearing.' L. K. et al. v. Gregg, c 6-85-1088, Minnesota Court of Appeals, December 31, 1985. The court followed the constitutional principles established in Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

The problem with respect to Rule 7 as presently constituted is that the District Committee can make recommendations but has no obligation to inform the respondent attorney. There is no opportunity at this stage for the attorney to be informed of the reports obtained by telephonic interviews or even to be given a detailed statement of the factual allegations.

While it may be argued that this District Committee functions in a preliminary fashion, it would not be considered perfunctory by an attorney undergoing that investigation. While the rule requires that the director notify the attorney, about the "progress of the proceedings," there is no right of the attorney to participate, to be heard, to respond, to review the file, or the cross-examining witnesses. There is no need for such a concentration of power in the District Committee. It actually may learn something by disclosing the matter to the attorney and testing the evidence so far gained by allowing cross-examination or rebuttal affidavits.

I would not argue that it is constitutionally mandatory that the attorney be afforded the right to cross-examine, review the files, and have an adversary hearing at every stage of the proceeds. That may be due process run riot. However, it is difficult to understand what the function of the District

Committee is if there be no requirement that the attorney be informed of the charges. The Board recommends that the attorney be made aware of the specific rule violations after the respondent shall have replied to the initial complaint. Board, p. 29. Of course, there is no provision at the District Committee level for a response to the complaint, or even for the attorney to be notified of it. The only notification is in Rule 6, which requires the district chair to notify the director of the complaints.

This argument couples into the next section.

III. RULE 8 SHOULD BE AMENDED TO PROVIDE RIGHTS TO THE ATTORNEY

Rule 8 provides for the director's investigation. The director may conclude that discipline is not warranted and will so notify the attorney involved, or the director may conclude that the conduct warrants an admonition. In that event, Rule 8(c)(2) provides that the director will notify the lawyer of the admonition, which is in lieu of presenting charges to a panel, and the lawyer may demand that the director present the charges to a panel. This is an *ex parte* proceeding, if the literal terms of Rule 8 be followed.

Rules 7 and 8 therefore clearly indicate that the District Committee may investigate and make recommendations to the director, who may make an investigation and issue an admonition. At that point, the attorney is notified. This admonition is obviously a punishment. It cannot be *ex parte*, at least not constitutionally; and this section is demonstrably coercive and invalid. An attorney faced with an *ex parte* determination that an

admonition has been entered into the attorney's file is then for the first time notified of the allegations, the rule violations, presumably, and the alternative of an appeal to the panel. This same provision empowers the panel to consider the matter de novo or instruct the director to file a petition in this court. There is no clear demarcation of restrictions on the discretion vel non of the director. This puts the respondent in an impossible coercive atmosphere where the first tendency is to accept the admonition, because it is not public; and second, to initiate an adversary proceeding after the respondent had already been admonished. This entire rule is back-end-to.

IV. RULE 9 NEEDS CONSIDERABLE RENOVATION

Some aspects of Rule 9 provide the procedures for panel proceedings and have been argued in my earlier brief. Foley, pp. 21-37. Experience since that time has provoked additional research on the procedures for a penal proceeding.

a. The rule should provide specifically that all files and records from the director in the board are available to the respondent.

Rule 20 provides that the files of the director in the board cannot be disclosed except under certain conditions, including (4) "upon request of the lawyer affected."

The rules on lawyer's professional responsibility do not create any ground for the director of the board to withhold any documents from the respondent. The court has not issued any indication that the conventional attorney-client privilege or the attorney work product privilege applies. Furthermore, the

director by qualifications, Rule 5, need not be an attorney. It therefore appears that there is no basis for withholding any documents, files or records; and the rules should be amended specifically to provide that these records shall be available at the panel hearing. The court should specifically indicate, in conformity with State v. Galvan, 374 N.W.2d 269 (Minn. 1985), that an interview of a witness does not become privileged information merely because the interview is conducted by an attorney.

b. The rules should determine the powers of the panel chair.

The present Rule 9 is not clear as to what the panel chair may do with requisite specificity and limitation. Rule 9(c) provides that the panel chair may rule on objections regarding requests for admissions but that otherwise the Rule of Civil Procedure for the District Courts shall control. Depositions are not subject to any rulings by the panel chair. Rule 9(d). Rule 9(g) provides that the respondent may present any witnesses whom the panel chair authorizes for good cause. Rule 9(n) provides that "requests or disputes arising under this Rule before the Panel hearing commences may be determined by the Panel chairman or vice-chairman."

There is no reason for presenting such power to the panel chair, with no limitation on the exercise of discretion. Discretionary power, if exercised arbitrarily, is subject to judicial review for denial of due process of law. Schachtman v. Dulles, 225 F.2d 938, 941 (D.C. Cir. 1955).

The present rules do not provide adequately for the review of the panel chair's discretion.

Rule 9(f) provides that the director shall schedule a hearing by the panel on the charges and notify the attorney. If the panel be in charge of the hearing, it is difficult to understand why the director controls the scheduling of the hearing. I recently had a notice issued by the director that included this paragraph:

> The hearing is scheduled for a date certain. Due to the limited availability of hearing facilities and the difficulty of convening volunteer panel members, the hearing date will not be continued, except in the most extraordinary circumstances.

It is difficult to understand the source of the power that the director has to conclude the admonition that "the hearing date will not be continued, except in the most extraordinary circumstances." It would appear that if the panel be in control, the scheduling and continuances should be solely up to the panel chair or the panel members, and not the director.

c. The panel chair should not have authority to exclude evidence.

Recent experiences have indicated that the panel chair independently exercises control over what may be presented to the panel members at the panel hearing. While Rule 9(g) provides that the panel chair may control the witnesses presented by the attorney, or the director, and I hardly agree to that as a fair procedure, there is no rule that empowers the panel chair to exclude exhibits. The Court should rewrite Rule 9 and

specifically provide for a resolution of disputed exhibits so that the attorney has a specific ruling by a qualified person, subject to intermediate judicial review of critical evidence.

d. The respondent attorney should be allowed to present any evidence which diminishes a finding of probable cause for public discipline.

Rule 9 does not specifically establish any standards for the evidence that is admissible or excludable at a panel hearing. However, Rule 9(i) limits the panel in its conclusion that public discipline is warranted by the precondition that it finds probable cause to believe that that public discipline is warranted. This is not just a matter of syntax, for it is obvious that the rule requires not only a finding of a violation but that public discipline for that violation is warranted. It is imperative that the attorney be allowed to adduce all evidence which tends to diminish the public discipline recommendation as well as any evidence tending to exonerate the attorney. The rules should be more specific, particularly in view of the fact that there is an apparent conflict between 9(h)(1), which empowers the panel to terminate a hearing when it finds probable cause or its lack, and 9(h)(3) and (4), which allows the attorney to respond to the director's remarks and produce evidence in conformity with the Rule of Evidence, as well as (5) oral arguments. Because of the disastrous effect which public proceedings against an attorney may have upon that attorney's practice, there is no reason why we ought to treat the attorney objecting to procedures as a pettifogger. Our adversary system is designed so that each side

is given ample opportunity to present a biased factual predicate, legal argument, and oral statement in support of a given position. There ought not to be any authority for the panel to terminate a proceeding and rule against the attorney until after that attorney shall have had ample opportunity for complete presentation of facts and arguments.

e. Discovery rules should be clarified.

Rule 9 does not provide for interrogatories. Rule 9(c) provides for requests for admission to be answered within ten days. That is of course, an unrealistic time. It empowers a panel chair to rule on the objections. There is no standard other than generally the rules of civil procedure. The court should create some rules and empower the attorney to request admissions of law as well as facts.

Interrogatories should be allowed for learning facts, legal conclusions, and contentions of the parties.

A rule should be created to empower a judge of the Ramsey County District Court to review any prepanel hearing issues with respect to constitutional law, discovery problems, genuineness of documents, and relevance of evidence.

f. Respondent at a panel hearing should be able to cross-examine all affiants and witnesses.

Rule 9(g) provides that the panel hearing shall receive affidavits as evidence. The affidavits, of course, by their nature would be *ex parte*. Because credibility is such an essential part of determining probable cause, the present rule appears to violate one's right to due process of law, that is an

absence of cross-examination, as well as the Sixth Amendment reference to confrontation to witnesses.

In Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843 (1969), the court considered a Louisana state committee which was to investigate crimes and issue public findings. Jenkins challenged the constitutionality and alleged that people had submitted false statements relating to him and that the proceedings constituted in effect an executive trial. The Court held that the proceedings did not meet minimum standards and said:

> Specifically, the Act severely limits the right of a person being investigated to confront and to cross-examine the witnesses against him. Only a person appearing as a witness may cross-examine other witnesses. Cross-examination is further limited to those questions which the Commission 'deems to be appropriate to its inquiry,' and those questions must be submitted, presumably beforehand, and in writing to the Commission. We are frequently emphasized that the right to confront and to cross-examine witnesses is a fundamental aspect of procedural due process. 395 U.S. at 428-429.

The presentation of affidavits at a panel hearing deprives the respondent of the constitutional right of confrontation and cross-examination. A correction of this fatal defect should be written into the rules.

While it may be suggested that my approach makes the panel hearing a full blown trial, it should be kept in mind that the function of the panel is not to prosecute but to determine the facts. This court stated the responsibility another way; it held, In re Scott, 172 Minn. 248, 215 N.W. 172 (1927) that:

> It is the duty of the court to protect the public in so far as possible from being subjected to unscrupulous lawyers, but it is

> also the duty of the court to protect the lawyers from being deprived of their means of livelihood by doubtful accusations.

This court has pointed out at least with respect to punishment that attorneys even after conviction may not be beyond the pale. Justice Yetka, In re Olkon, 324 N.W.2d 192, 195 (Minn. 1982) considered the attorney who had been convicted but argued against suspension as follows:

> In order to achieve that objective, we must find the need to consider mitigating circumstances to be important equally in the case of law practice related felonies as with non-law offenses.

These two cases last cited clearly indicate that all along, the proceedings should allow for whatever evidence may tend to mitigate. It therefore must be fairly inferred that the court would desire, and due process should mandate, that credibility and exonerating evidence should be adduced at an early stage.

The court should not allow for procedures which develop into the long drawn out proceedings culminating in In re Rerat, 232 Minn. 1, 24 N.W.2d 273 (1950), which involved various serious charges against Gene Rerat, a prominent personal injury plaintiff's lawyer. This Court pointed out that evidence to deprive an attorney of his means of livelihood must be "cogent and compelling." 44 N.W.2d at 275. Of great significance in the context of this section is this Court's observation with respect to credibility and exonerating evidence:

> With respect to the Burlington Railroad particularly, it appears to have received a great deal of cooperation from the Special Assistant Attorney General of the State of Nebraska in connection with the effort made to disbar respondent. Clearly, there are reasons

where the claims departments of the railroads would be pleased to see respondent disqualified from the practice of law. The phase of this part of the proceedings that does not appeal to us particularly is that one John Samson, while acting as a Special Assistant Attorney General for the State of Nebraska, also appears to have gone with a railroad claim agent in several instances and obtained a statement from claimants on the same day that the claim settlement was made. A review of these statements would clearly indicate in most instances that they are not necessarily in the language of the claimant, but were perhaps dictated and written in the language of the party taking the statement. For example, if it is true, as claimed in the testimony of Mrs. Rose C. Kline, that Samson took her in the sheriff's car from the funeral and had her sign a statement against her wishes, little credence could be given to such a statement. We also have the case of Harry Benon an admitted soliciter in his own right, a man not admitted to the practice of law, and a man who apparently was acceptable to the railroad companies in connection with the settlement of claims he solicited. His testimony involving respondent related to a time back in 1943, when he claims he worked for him for a few months. If the testimony of Don Chapman is to be considered, that after giving an affidavit to the railroad claim agent charging respondent with solicitation favors he (Benon) later came back and repudiated this statement on the claim that he had to give it 'or else' his testimony could receive little recognition. So far as the deposition and the later repudiation affidavit of L. L. Cofield is concerned, we agree with the referee that no consideration can be given to them. He is a man who claimed to have worked for respondent in 1942 and has so testified in his deposition taken December 2, 1947. He then almost complete repudiated his deposition in the affidavit previously referred to. His affiliation with Brennan, superintendent of special services for the Santa Fe, and the method used by the railroad company in paying him are not too convincing -- a situation where apparently large sums were paid to Cofield with no special accounting record of these payments being kept by the railroad company. No credence can be given to Cofield's testimony based on his own

> record, and we would not consider it sufficient in itself to justify disbarment of respondent. 44 N.W.2d at 304-305.

The court has obviously long acknowledged the practical advantage, indeed the constitutional necessity, of extensive testimony about the motivation and thoroughness involved in the witnesses testifying against an attorney. There is no practical necessity for delaying extensive testing of credibility until after the charges shall have been made public and a referee appointed. These are matters, that is credibility issues and the strength of the director's evidence, which ought to be ventilated before the charges are public.

Cross-examination is a constitutional necessity at any critical stage of a proceeding. Gerstein v. Pugh, 420 U.S. 103, 121, 95 S.Ct. 854, 867 (1975).

This Supreme Court has held that all evidence that may tend to impeach a witness is relevant and requires confrontation and cross-examination of those whose word deprives a person of his livelihood. This includes procedural due process and the admission to practice law. Willnar, supra, 373 U.S. at 103, 83 S.Ct. at 1180.

It would appear that any ex parte statement depriving a person of cross-examination, particularly when excluding a test of hostility, is inappropriate. Bell Helicopter International Inc. v. Jacobs, 746 F.2d 1342, 1344 (8th Cir. 1984); Southern Stevedoring v. Voris, 190 F.2d 275, 277 (5th Cir. 1971). It has even been held that a defendant in a criminal case when forced to

view the testimony of the alleged victim solely by television deprives one of constitutional rights. The court in United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979) held,

> * * * we are satisfied that the rights of Benfield were abriged by the above procedure. Normally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place. * * * while some recent case use other language, none deny [sic] that confrontation requires a face-to-face meeting * * *. While a deposition necessarily eliminates a face-to-face meeting between the witness and jury, we find no justification for further abridgement of the defendant's rights.

A rule can be written simply to allow the utilization of affidavits if the respondent shall have been given ample opportunity to cross-examine the affiant. In its absence, affidavits should be by rule excluded.

g. Rule 9(g)(3) limits the respondent witnesses to those approved for good cause by the panel chair.

There is no justification under the Constitution for limiting the respondent's witnesses to those for whom "good cause" is determined by the director. In any quasi-criminal case, the accused is entitled to present evidence demonstrating that adverse witnesses have been motivated "* * * by malice, vindictiveness, intolerance, prejudice, or jealousy." Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413 (1959). The court specifically pointed out that confrontation was involved "in all types of cases where administrative and regulatory actions were under scrutiny." 360 U.S. at 497, 79 S.Ct. at 1413-1414. Any diminution of cross-examination affects the integrity of the fact-finding process.

Chambers v. Mississippi, 410 U.S. 285, 295, 93 S.Ct. 1038, 1046 (1973). The court should provide that any complainant must be present, and even informers must have their veracity tested by cross-examination. Steinmark v. Parratt, 427 F.Supp. 931, 936 (D.C. Neb. 1977). Absence of cross-examination makes the procedure constitutionally inadequate. Crook v. Baker, 584 F.Supp. 1531, 1556-1560 (D.C. Mich. 1984). That includes attacking motivation in testimony. In United States v. Witschner, 624 F.2d 840, 844 (8th Cir. 1980). Any person producing evidence against the respondent must be produced as a witness. Cooley v. Board of Education, 453 F.2d 282 (8th Cir. 1972).

The critical nature of a panel hearing requires production of witnesses. Other states have imposed constitutional limitations on local committees and preliminary panel hearings. In Re Keller, 401 P.2d 616 (Nev. 1965). That involved a black lawyer who lived in Brooklyn and moved to Nevada and requested admission to practice. He was denied confrontation of the witnesses, and the administrative committee did not disclose confidential reports. The high court there said:

> Confidential reports and the testimony of witnesses taken without confrontation and cross-examination and without notice to applicant as to the issues cannot prevail against an established good character in the testimony of the petitioner. 401 P.2d at 618.

The court pointed out that a subsequent opportunity to cross-examine may not immunize the defects in the original panel hearings. Ibid.

In Application of Dinan, 157 Conn. 67, 244 A.2d 608 (1968), there was a two-tier committee system in the grievance procedure on attorney's discipline. The attorney requested the chair to disqualify himself because of adverse testimony by the chair about Dinan during the grievance committee hearing. The request was denied. The court reversed and said,

> When the standing committee submits its report and recommendation to the court, the court must determine whether the committee acted after a fair investigation and hearing whether it exercised its discretion reasonably and without prejudice. (citation). In addition, the court must determine whether the committee conducted its proceedings in the manner which conforms to the requirements of procedural due process. 244 A.2d at 610.

An attorney should be able to cross-examine the author of each document, irrespective of the apparent authenticity of the document. Appeal of Icardi, 436 Pa. 364, 268 2d. 782 (1970). That conclusion flows naturally from the principle that hearsay evidence is inadequate as a basis for a refusal to admit one to practice law. Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1965). See Application of Peterson, 459 P.2d 703 (Alaska 1969), which remanded an attorney's discipline and required adequate constitutional proceedings before any public charges are filed.

It is conceivable that under the present rules controlling the procedures of panel hearings, the court when properly presented with the issue could hold that the finding of probable cause and the instruction to the director to file a public petition were predicated upon unconstitutional procedures at the panel level and therefore remand the matter to the panel

for a new hearing. The purpose of the court's acting in this legislative capacity, in issuing rules and regulations, is to obviate predictable constitutional issues. The court should therefore resolve these conflicts and issue more precise regulations along the lines which I have suggested.

g. The court should specifically provide that the respondent may present reputation witnesses.

The courts are familiar with the rule of reputation witnesses. The Rules of Evidence to be followed in all civil trials in Minnesota do not directly apply to attorney discipline cases. However, Rule 802(21), Rules of Evidence, provides that the hearsay rule does not exclude evidence as to the reputation of a person's character. Rule 608, Rules of Evidence, provide that the credibility of a witness may be attacked by character evidence. Rule 405 provides for proof of evidence of character by testimony as to reputation or by testimony by opinion.

The court should issue a rule allowing use of reputation witnesses. Such witnesses are critical because they assist the subjective evaluations by the panel members with regard to the Director's witnesses. See In Re Herich, 10 Ill.2d 257, 140 N.E.2d 825 (1957), which considered the character witnesses for the attorney in that disbarment proceeding and held that "where the evidence is conflicting and the charge does not import criminality or moral turpitude the court should give great weight to such testimony of good reputation."

Because attorney discipline cases in the last 20 years have become fully adversary, the court should issue specific rules

that protect the rights of the attorney and limit the exclusionary powers of the panel chair and the panel members. The court therefore should issue a rule allowing for the use of reputation witnesses at the panel hearing.

V. RULE 17 RELATING TO CONVICTIONS SHOULD PROVIDE FOR THE EFFECT OF AN ACQUITTAL.

Rule 17 provides for notification to the Director of any felony conviction of an attorney and provides that disciplinary proceedings may be conducted in actions involved in the conviction of a misdemeanor or in the absence of a criminal conviction. The panels, the board, and this court have no specific guildeline as to the effect of an acquittal.

There is no need to argue or even to suggest that an acquittal bars attorney discipline by res judicata. The books are legion with authority that there is no res judicata effect. However, that does not mean that under certain circumstances an acquittal ought not to be considered as inhibiting discipline procedures.

This Court has held that an acquittal does not preclude professional discipline. In Re Heinze, 233 Minn. 391, 47 N.W.2d 123 (1951). In that case, Heinze had been charged both by the Bar Association and by the County Attorney of having committed indecent assault with young boys. He was acquitted on the criminal charges and then left the state. Four years later, he returned and attempted to retain his license by reason of the acquittal. The court struck that argument down.

There are several ways of looking at this problem. North Dakota has a rule, as reported in In Re Lyons, 193 N.W.2d 462, 464 (N.D. 1971), as follows:

> Where such act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to suspension or to the institution of disciplinary proceedings, nor shall acquittal necessarily constitute a bar thereto.

That state therefore clearly points out that acquittal does not preclude discipline proceedings.

California has some interesting cases. In Zitny v. State Bar of California, 51 Cal. Rptr. 825, 415 P.2d 521 (1966), the attorney was indicted on conspiracy, soliciting, and receiving bribes. He was acquitted. The State Bar then initiated discipline proceedings, and the principal witnesses at the criminal trial testified in the discipline hearings. The court pointed out that the attorney received the benefit of all reasonable doubts and the favor of the reasonable inferences when two or more may be drawn from the fact. The court then made this interesting comment:

> When the findings and recommendations rest primarily on testimonial evidence, we are reluctant to reverse the decision of the local administrative committee, which was in a better position to evaluate conflicting statements after observing the demeanor of the witnesses and the character of their testimony. (citations). Necessarily, however, less reliance is placed on this rule when, as in the present case, a jury heard much the same evidence that the local administrative hearing heard and acquitted petitioner of virtually the same charges involved in the disciplinary proceedings. 415 P.2d at 523.

The court there acknowledged that there was no res judicata effect. But the court was manifestly persuaded that the verdict of the public ought to assist in the resolving of contested fact issues.

Zitny was followed by Siegel v. Committee of Bar Examiners, 110 Cal. Rptr. 15, 514 P.2d 967 (1973), where Siegel had passed the bar but had been precluded from admission for lack of good moral character. Part of the problem was his having stated in speaches some rather sharp rhetoric for which he had been charged with criminal violations but acquitted. The court then said,

> Moreover, in cases where another qualified trier of facts has heard essentially the same evidence but has reached a conclusion contrary to that reached by the Committee with regard to a given issue, this Court will discount the degree of reliance normally accorded the Committee's finding on that issue. 514 P.2d at 980.

While these cases are not the sole cases touching on the effect of a conviction or acquittal, the court should give consideration to whether any acquittal should have any effect on bar proceedings and then establish the standards.

With the multiplicity of panels involved in the Minnesota system, this court should give serious consideration to establishing more precise standards on the principal areas of evidentiary permissibility and effect.

Rule 16 providing for interim suspension should not be changed. The board, page 37, recommends providing that upon a referee's recommendation, for disbarment after court order, the

respondent's authority to practice law should be suspended pending final determination of the disciplinary proceeding.

The board makes this recommendation on the statement that in recent years, whenever the referee has recommended disbarment, the court has either suspended or disbarred the respondent. There is no particular reason why this will continue with statistical uniformity. Furthermore, there ought to be provision for a separate consideration of any interim suspension attempt.

The Minnesota Rules on Board of Judicial Standards provides in Rule 7 for interim sanctions to follow automatically by court order upon the judges having been indicted for felony. In misdemeanors, however, the judge is given a prompt hearing and a determination by this Court on application for review of the interim suspension order.

CONCLUSION

As I have indicated in this statement, I represent an attorney in discipline proceedings presently before the court, and those proceedings may be affected by this court's rulings on the mended rules of lawyer's professional repsonsilibty. However, I believe that the court ought not entirely to disregard these observations for several reasons. First of course is that the court, by appropriate considerations may ensure that amendments relevant to ongoing proceedings are not changed. Second, few lawyers get involved in the disciplinary procedures. Very few lawyers are disciplined, and they are represented by even few lawyers. Thus, it is that the Bar in general has limited

experience for complications and consitutional problems aroused by discipline proceedings. Why we have from time to time represented lawyers since I enjoined a state-wide grand jury investigation into a lawyer in Montana in 1976. Kelly v. Gilbert, 437 F.Supp. 201 (D.C. Mont. 1976). The court there said among other things,

> At times, the due process clause of the Fourteenth Amendment acts as a constitutional stop sign, controlling the traffic of the interaction between a state and her citizens, designed to impart caution and ensure fairness at significant junctures of that relationship. 437 F.Supp. at 221-222.

The United States Supreme Court has clearly pointed out that the Fifth and Fourteenth Amendments to the United States Constitution extend to lawyers as well as other individuals. Spevack v. Klein, 385 U.S. 511, 514, 87 S.Ct. 625, 627 (1967). These rights extended to attorney's flow from a rich history of the bar. The classic case of ex parte Garland, 4 Wall. 333, (1967), stated through Justice Field:

> The profession of an attorney and counselor is not like an office created by an Act of Congress, which depends for it continuance, its powers and its emoluments, upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counselors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such offices. They are officers of the court; admitted as such by its order, upon evidence of their possesesing sufficient legal and fair private character. * * * They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. (citations) Their admission or exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power * * *.

> The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revokable at the pleasure of the court, or at the command of the Legislature. It is the right of which he can only be deprived by the judgment of the court, for moral or professional delinquency. 71 U.S. at 373.

As I pointed out on earlier occasions, Congressman James Buchanan stated in 1833, as quoted in Cammer v. United States, 350 U.S. 399, 406-407, 76 S.Ct. 456, 560 (1956):

> I believe that I have as good a right to the exercise of my profession, as the mechanic has to follow his trade, or the merchant to engage in a pursuit of commerce. * * * The public have almost as deep an interest in the independence of the bar as of the bench.

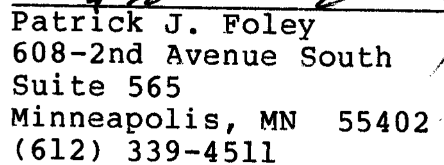
The court need not effect all the changes which I propose, nor need it effect those at the same time. The court can create certain changes and make them effective prospectively only, so as to avoid affecting any pending matters. However, the court should give serious consideration to a general renovation of the procedural devices by which lawyers are disciplined in this State. The fact that the panel members are under utilized, coupled with the realization that there are no precise rules guiding the panel members in their determinations, should induce the court to a consideration of whether there ought to be more precise standards controlling the otherwise totally independent panels so that the rule which is objective will guide all parties and the panel members, and ultimately this court, to the proper resolution of

the conflicts after oral relevant matters shall have been presented.

Dated: March 5 1986

Respectfully submitted,

DePARCQ, PERL, HUNEGS, RUDQUIST & KOENIG, P.A.

BY 
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IN SUPREME COURT
STATE OF MINNESOTA

In Re: Report of the Supreme Court Advisory
Committee on Lawyer Discipline

MOTION TO BE HEARD ON ORAL ARGUMENT

Patrick J. Foley, having had some experience in representing attorneys before this court and other courts, having submitted several statements on the matter, and having urged certain considerations that new rules and procedures not be applied to pending matters, hereby notifies the court that he will be available for presentation or oral arguments on consideration of the advisory committee on lawyer discipline on March 18, 1986 if oral argument is decided by the Court.

Dated: March 3/86

DePARCQ, PERL, HU:NEGS, RUDQUIST
& KOENIG, P.A.

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