

## July 2016: Court Amends Judicial Code and Rules

### Update to *Minnesota Legal Ethics* (July 5, 2016)

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Effective July 1, 2016, the Minnesota Supreme Court amended the Code of Judicial Conduct and the procedural Rules of the Board on Judicial Standards. There was a notice and comment period for these proposals, but the proposals were not controversial. The full texts of the Code and Rules as amended are available on the Board's website. <http://www.bjs.state.mn.us/> The Code and Rules were last amended in 2009.

The Minnesota Supreme Court is authorized to adopt and amend both the Code and the Rules. The Legislature has also enacted statutory procedural and substantive standards. Counterparts to these statutes are generally found in the Code and the Rules.

In recent years, the Board has met from time to time with representatives of the Minnesota District Court Judges Association, to discuss the MDJA's and the Board's ideas for improvements to the Board Rules. The Board is mindful that its primary duty is to the public, but welcomes communications with the MDJA. The MDJA supported the Board's petitions for amendments to the Code and the Rules.

**Code Amendments.** The Code of Judicial Conduct was amended in two ways. The first amendment retains a general prohibition. A judge is prohibited from "appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used" fund-raising events. Rule 3.7(A)(4). The amendment now allows such activities, but only where three conditions are met:

1. the event concerns the law, the legal system, or the administration of justice, and
2. the judge does not encourage persons to buy tickets for or attend the event or to make a contribution except as provided in paragraph (A)(2) of this rule, and
3. participation does not reflect adversely on the judge's independence, integrity, or impartiality.

The amendment allows activity that is widely regarded as permissible. The amendment makes Minnesota's rule like the ABA Model Rule, with small variations. It should also be noted that a judge's "mere attendance" at a fund-raising event, regardless of the event's purpose, continues to be permitted. Rule 3.7 cmt. 3.

The second amendment removes an inconsistency in the Code. Rule 4.2(B)(3)(c) had allowed a judicial candidate to personally solicit campaign contributions from other judges, but Rule 4.1(A)(4)(b) prohibited a judge from making a contribution to a candidate. The amendment removes the permission for a judge to personally solicit campaign contributions from other judges. The policy reason for prohibiting such solicitations is straightforward. Although personal solicitation of campaign contributions from fellow judges does not present the same potential harm as personal solicitation of other persons, a solicitation for a contribution to the judge's own election campaign involves a degree of self-interest, and risk of pressure on the judge who is solicited.

**Amendments to Board Rules.** Many of the Rule amendments could be called “housekeeping,” in that they clarify rules and terminology, streamline procedures, etc. However, several amendments are of some importance.

The most important procedural amendment is new Rule 7, “Admonition Review Hearing.” Admonitions are private disciplines, issued to judges for isolated and non-serious misconduct. Prior rules provided for admonition appeals to be heard by the same Board that issued the admonitions. Amended Rule 7 provides for appeals to be heard by a three-person panel appointed by the Supreme Court. The hearing is not public. Amended Rule 7 also provides that if the panel affirms an admonition, the judge may file a petition for review with the Supreme Court. These amendments enhance fairness and bring judicial admonition procedures more in line with such procedures for lawyers. The amendments probably will affect few actual proceedings. Since 2009, when “admonitions” supplanted “warnings,” there has been only one admonition appeal.

Three amendments clarify authorizations for the Board and its Executive Secretary.

1. The Board may act through its Executive Committee between meetings, except that only the Board may find reasonable cause to believe a judge has committed misconduct.
2. The Executive Secretary may “Issue informal advisory opinions to judges as delegated by the board.” Rule 1(e)(11).
3. The Executive Secretary is authorized to summarily dismiss a complaint that does not contain a basis for a reasonable belief that misconduct may have occurred. Rule 6(b). The prior summary dismissal standard was based on whether the complaint stated a rule violation. However, some complaints state rule violations, but not in a credible way. For example, a complaint may allege, without any credible evidence, a vast conspiracy of state and federal officials, including numerous state court judges, to deprive the complainant of civil rights.

Three amendments affect procedures in public discipline cases.

1. A judge has the right to meet with Board representatives before the Board files a formal complaint against the judge. Rule 6(f)(8). This amendment codifies existing practice.
2. The Board may take the judge’s deposition. With authorization of the judge appointed by the Supreme Court to preside over public panel hearings, the Board and the judge may take other depositions. Rule 9(b).
3. When a hearing panel recommends suspension or disbarment, there will be simultaneous consideration by the Supreme Court of whether lawyer discipline as well as judicial discipline should be imposed. Before amendment, simultaneous consideration of lawyer discipline was triggered only upon a panel’s recommendation for disbarment. The amendment will eliminate separate proceedings in some cases, e.g., *In re Pendleton*, 870 N.W.2d 367 (2015), 876 N.W.2d 296 (Minn. 2016).

An amendment clarifies exceptions to the general rule that a judge is not subject to discipline for applying the law as understood by the judge. The exceptions are where “the judge acts contrary to clear and determined law and the error is egregious, made in bad faith, or made as part of a pattern or

practice of legal error.” Rule 4(c). Although the great majority of the Board Rules govern procedures, a few function more like the Code, by providing substantive standards.

A judge is required to “be patient, dignified and courteous” in judicial office. A significant number of complaints received by the Board allege improper demeanor. A new rule facilitates the Board’s consideration of such complaints. The rules ensures access to transcripts and audio recordings, “Upon request by the board, the judge shall order and provide a transcript of the portions of hearings requested by the board. See Minn. Stat. § 486.06. Notwithstanding Rule 4, subd. 3 of the Rules of Public Access to Judicial Records, the Board may also obtain audio recordings of court proceedings.” Rule 6(h).

An amendment simplifies the schedule for expunging dismissed files. A uniform period of four years after dismissal now applies. Rule 19.

No further Code or Rules amendments are presently contemplated, but the Board welcomes comments and suggestions for improved procedures and standards. Finally, an acknowledgement should be made of the leading role in drafting and considering amendments of Tom Vasaly, Executive Secretary, Board on Judicial Standards.