

1.8 Attorney Discipline.

(a) Assignment of Disciplinary Matters.

- (1) Assignments to Chief District Judge.** The chief district judge is assigned to resolve any attorney discipline matter that relates to (i) grand jury proceedings, (ii) an attorney convicted of a crime, (iii) an attorney who has been disbarred or suspended by another court, (iv) an open or closed criminal or civil case (including bankruptcy cases) in which the assigned judge is unable or unwilling to resolve the attorney discipline matter, or (v) any other instance not otherwise provided for by this rule. The chief district judge may reassign any such matter to any other judge of this court including a magistrate judge or a bankruptcy judge. If the chief district judge is unable or unwilling to resolve or reassign the matter, an active district judge selected at random will receive the assignment and, if there is no active district judge able or willing to accept the assignment, a senior district judge selected at random will receive the assignment.
- (2) Assignments to Presiding Judge.** The judge (including a bankruptcy judge or a magistrate judge) assigned to resolve an open or closed criminal or civil case is also assigned to resolve any attorney discipline matter that relates to that open or closed criminal or civil case. In cases in which a district judge and a magistrate judge have both been assigned to an open or closed criminal or civil case, the assignment of the disciplinary matter will be to the district judge. In an open or closed bankruptcy case, the assignment will be to the bankruptcy judge except where the alleged disciplinary violation occurred before a district judge (as in appeals or otherwise) and in that circumstance the assignment will be to the district judge. If the assigned judge is no longer a member of the court, the chief district judge will either handle the case or assign it to another judge.
- (3) Assignments and Other Responsibilities of the Clerk.** In accordance with this rule, the clerk of the district court will make assignments to judges of disciplinary matters. The clerk will establish and implement a separate attorney discipline docket. All filings regarding disciplinary matters will be included in that docket and sealed unless ordered otherwise. All filings regarding disciplinary matters will be made in an "Attorney Discipline" ("AD") case and the clerk will "relate" that matter in the CM/ECF record keeping system with the civil, criminal, or bankruptcy cases in which the disciplinary matter arose, if any. "AD" cases involving the same attorney will also

be "related." The clerk may seek guidance from the chief district judge in the event a question arises regarding the construction or operation of this rule. The clerk shall follow the direction of the chief district judge, and the chief district judge's decision is final.

- (4) **Assistance of Magistrate Judge.** The chief district judge will assign one magistrate judge to assist in the handling of all attorney discipline matters and the clerk will make that magistrate judge the "referral judge" for purposes of the court's CM/ECF recording keeping system.¹ The judge to whom the attorney discipline matter has been assigned will determine what role the magistrate judge will perform in a particular case and the magistrate judge will take no action until authorized to do so by the assigned judge.
- (b) **Power of Assigned Judge.** The judge to whom an attorney discipline matter has been assigned will determine the procedures to be followed for each attorney discipline case and may deviate from this rule in the judge's discretion when necessary or appropriate. However, except where it is apparent that discipline will not be imposed, all disciplinary procedures will provide the accused attorney with notice and an opportunity to be heard by an impartial judge. A judge to whom an attorney discipline matter has been assigned, and not the court en banc, may alone impose discipline including suspension, disbarment, reprimand, or any other sanctions.
- (c) **Coordination with Nebraska's Counsel on Discipline.** With the agreement of the Nebraska Supreme Court, the Counsel for Discipline of the Nebraska Supreme Court ("Counsel for Discipline") is authorized to disclose and refer to the judges and clerks of this court, including bankruptcy judges and the bankruptcy clerk, disciplinary complaints that are filed with its office and that are related to (i) open or closed federal criminal or civil cases including opened or closed bankruptcy cases, (ii) federal grand jury proceedings, or (iii) a federal case involving a lawyer who is a potential witness. This court and this court's judges and staff will maintain such complaints and documents in confidence and as sealed records. The Counsel for Discipline will hold in abeyance the investigation of such a referred matter until a judge of this court informs the Counsel for Discipline of the resolution of the matter. After a judge of this court has resolved the referred matter, the Counsel for Discipline will take such further or other action as appropriate. Should a judge of this court not resolve the referred matter in a timely manner, the Counsel for Discipline will take further or other

¹On April 20, 2011, Magistrate Judge Zwart was appointed by Chief Judge Bataillon to serve in this capacity. That appointment is hereby confirmed. (Fall, 2011)

action as appropriate, without regard to the referral to a judge of this court.

(d) Attorneys Convicted of Crimes.

- (1) Suspension.** When a certified copy of a judgment of conviction is filed with the court showing that an attorney admitted to practice in this court has been convicted of a serious crime in any court of the United States or the District of Columbia, or of any state, territory, commonwealth or possession of the United States, the judge enters an order immediately suspending the attorney. The judge enters the suspension order whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial, and regardless of the pendency of an appeal. The judge immediately serves the attorney with a copy of the suspension order. The judge may set aside the suspension order for good cause and in the interest of justice. The suspension is effective until the final disposition of the disciplinary proceeding required by this rule.
- (2) "Serious Crime" Defined.** The phrase "serious crime" includes any felony. It also includes any lesser crime a necessary element of which, as determined by the statutory or common law definition of crime in the jurisdiction where the judgment was entered, involves false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a serious crime.
- (3) Conclusive Evidence.** A certified copy of a judgment of conviction of an attorney for any crime is considered conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that attorney based on the conviction.
- (4) Mandatory Disciplinary Proceeding.** In addition to suspending an attorney convicted of a serious crime, the judge issues an order to show cause requiring the attorney to explain why the attorney should not be immediately disbarred. If the attorney fails to respond, the attorney will be immediately disbarred. If the attorney responds, the judge may refer the matter to counsel for prosecution of a disciplinary proceeding before the judge or take such other action as may be appropriate to resolve the matter. The sole issue to be determined in this proceeding is the extent of the final discipline to be imposed as a result of the conduct resulting in the conviction. If the attorney responds to the order to show cause, the judge will not resolve the

matter until the attorney has exhausted all direct appeals from the conviction.

- (5) **Discretionary Disciplinary Proceeding.** When a certified copy of a judgment of conviction is filed with the court showing that an attorney admitted to practice in this court has been convicted of a crime not constituting a serious crime as defined in this rule, the judge may refer the matter to counsel for whatever action counsel may consider warranted, including the institution of a disciplinary proceeding or the judge may take such further or other action as may be appropriate.
- (6) **Reinstatement.** An attorney suspended under this rule will be reinstated immediately upon the filing of a certificate showing a reversal of the underlying conviction of a serious crime. An attorney's reinstatement does not terminate any disciplinary proceeding then pending against the attorney.

(e) Discipline Imposed by Other Courts.

- (1) **Attorney's Duty to Notify This Court.** Any attorney admitted to practice in this court must promptly inform the clerk if any other court of the United States or the District of Columbia or a court of any state, territory, commonwealth or possession of the United States publicly disciplines the attorney.
- (2) **Notice to Attorney.** If a certified or exemplified copy of a judgment or order is filed demonstrating that an attorney admitted to practice in this court has been disciplined by another court, the judge issues a notice directed to the attorney, containing:
 - (A) a copy of the other court's judgment or order; and
 - (B) an order directing the attorney to show cause why the court should not impose the same discipline.
- (3) **Discipline Stayed.** If the other jurisdiction has stayed its imposed discipline, the judge defers any reciprocal discipline until the stay expires.
- (4) **Discipline Imposed.** The judge imposes the same discipline imposed by another jurisdiction 30 days after service of the notice issued under this rule, unless the respondent/attorney shows, or the

judge finds, that on the face of the record upon which the other jurisdiction's discipline is based, it clearly appears:

- (A) the procedure was so lacking in notice or opportunity to be heard that it resulted in a deprivation of due process;
- (B) an infirmity of proof establishing the misconduct shows that the judge could not, consistent with his or her duty, accept as final the conclusion on that subject;
- (C) the imposition of the same discipline would result in injustice;
- (D) the established misconduct warrants substantially different discipline; or
- (E) the conduct found to warrant discipline in the other jurisdiction would not constitute a violation of the ethical standards stated in Nebraska General Rule 1.7(b) and, accordingly, no discipline should be imposed in this court.

If the judge determines any of these elements exists, he or she may enter an appropriate order.

- (5) **Conclusive Evidence.** In all other respects, another court's final adjudication that an attorney is guilty of misconduct conclusively establishes the misconduct in any disciplinary proceeding in this court.
- (6) **Appointment of Prosecuting or Investigating Counsel.** The judge may at any stage appoint counsel to prosecute the disciplinary proceedings or to conduct an investigation and report the results of that investigation to the judge.

(f) **Disbarment on Consent or Resignation in Other Courts.**

- (1) **Disbarment.** When a certified copy of a judgment or order accepting an attorney's disbarment on consent or resignation is filed with the court showing that an attorney admitted to practice in this court will be disbarred on consent or resign from the bar of any other court of the United States or the District of Columbia or from the bar of any state, territory, commonwealth or possession of the United States while an investigation into allegations of misconduct is pending, the attorney is no longer allowed to practice in this court and is stricken from the court's roll of attorneys.

- (2) **Attorney's Duty to Notify This Court.** Any attorney admitted to practice in this court must promptly inform the clerk of a disbarment on consent or resignation from the bar of any other court of the United States or the District of Columbia or from the bar of any state, territory, commonwealth, or possession of the United States while an investigation into allegations of misconduct is pending.

(g) Violation of Ethical Standards.

- (1) **Jurisdiction.** This court has disciplinary jurisdiction to investigate and, if appropriate, discipline any attorney admitted to practice in this court, and any attorney specially admitted to this court for a particular case, with respect to the attorney's alleged misconduct arising during or in the preparation of a case pending in this court. This court also has jurisdiction to investigate and, if appropriate, discipline any attorney admitted to practice in this court, and any attorney specially admitted to this court for a particular case, with respect to the attorney's alleged misconduct in any matter or circumstance that reasonably bears upon the attorney's fitness to practice law in this court.
- (2) **Disciplinary Action.** Misconduct, as defined in these rules, may result in disciplinary action against an attorney if, after providing the attorney with notice and opportunity to be heard, good cause is shown to support a finding of misconduct. An attorney subject to the court's disciplinary jurisdiction may be disbarred, suspended from practice before the court, reprimanded, or subjected to other appropriate disciplinary action.
- (3) **"Misconduct" Defined.** Acts or omissions by an attorney, acting individually or in concert with any other person or persons, that violate the ethical standards stated in Nebraska General Rule 1.7(b) constitute misconduct and are grounds for discipline, whether or not the act or omission occurred in the course of an attorney/client relationship.
- (4) **Suggested Disciplinary Procedure.** Where a more specific procedure has not otherwise been provided for in this rule, the following procedure may be used in investigating alleged misconduct occurring within the court's disciplinary jurisdiction. The following procedure does not limit or govern the court's exercise of additional powers necessary to maintain control over proceedings conducted before it, such as proceedings for contempt under Title 18 of the

United States Code or Federal Rule of Criminal Procedure 42. In addition, the following procedure does not limit the power of a judge to establish such further or other procedures as are necessary or appropriate in any attorney disciplinary case.

- (A) **Initial Review.** When a judge of this court learns by complaint or otherwise of an attorney's alleged misconduct that, if substantiated, would warrant discipline, the judge may conduct an initial review of the matter, or refer it to the magistrate judge for initial review and recommendation. The judge or magistrate judge may solicit the views of the accused attorney and anyone else before concluding the initial review. If, after initial review, it appears that no discipline is warranted, the judge may enter an appropriate order.
- (B) **Further Action.** When a judge of this court learns by complaint or otherwise of an attorney's alleged misconduct that, if substantiated, would warrant discipline, the judge may (i) impose an appropriate sanction if the judge concludes that the misconduct is substantiated by the record before him or her, (ii) refer the matter to counsel for investigation and the prosecution of further disciplinary proceedings or other appropriate recommendation, or (iii) take such further or other action as the judge deems appropriate. At any time, the judge may solicit the views of the accused attorney and anyone else.
- (C) **Investigating Counsel.** If the complaint alleges misconduct that, if substantiated, may warrant discipline and the judge believes an investigation of the facts by counsel would be helpful, the judge may appoint counsel under this rule to investigate the allegations of misconduct and prosecute disciplinary proceedings if appropriate.
- (D) **Investigating Counsel's Recommendation.** After investigation, investigating counsel may file a recommendation indicating that the matter should be (i) dismissed because insufficient evidence exists to support the imposition of discipline, or (ii) deferred because another proceeding is pending against the respondent/attorney, the disposition of which should be awaited before the judge considers additional action. Investigating counsel may also recommend other courses of action.

(E) **Order to Show Cause.** To initiate additional disciplinary proceedings, and upon a showing of probable cause, investigating counsel must obtain an order from the judge requiring the respondent/attorney to show cause why the attorney should not be disciplined. If an order to show cause is issued, investigating counsel will proceed to prosecute the disciplinary matter as prosecuting counsel.

(F) **Hearing After an Order to Show Cause.** If the respondent/attorney answers the order to show cause, the judge will set a hearing if (i) the answer raises an issue of fact or (ii) the respondent/attorney wishes to be heard in mitigation. If the attorney fails to respond, or the response fails to raise an issue of fact and fails to request the opportunity to be heard in mitigation, the judge proceeds, without a hearing, to take such action as may be warranted under the circumstances.

(5) **Disbarment on Attorney's Consent.**

(A) **Attorney's Affidavit; Contents.** An attorney admitted or specially admitted to practice before this court who is the subject of an investigation or pending proceeding involving allegations of misconduct in any jurisdiction, including this court, may consent to disbarment by this court, but only by delivering to the court an affidavit stating that the attorney consents to disbarment and:

- (i) the attorney freely and voluntarily consents, is not under coercion or duress, and is fully aware of the implications of consenting;
- (ii) the attorney is aware of a presently pending investigation or proceeding involving allegations that grounds exist for the attorney's discipline, the nature of which the attorney must specifically state;
- (iii) the attorney acknowledges that the alleged material facts are true; and
- (iv) the attorney consents because the attorney knows that if charges were brought based on the matters under investigation or if the proceeding were prosecuted, the attorney could not present a successful defense.

- (B) **Court Order.** Upon receiving the attorney's affidavit, a judge will order the attorney disbarred.
- (C) **Public Disclosure of Affidavit and Order.** An order disbarring the attorney on consent is a matter of public record; however, the affidavit required under this rule must not be publicly disclosed or made available for use in any other proceeding except upon the judge's order.

(6) **Reinstatement.**

- (A) **After Disbarment or Suspension.** An attorney suspended for 3 months or less is automatically reinstated at the end of the suspension period upon filing an affidavit of compliance with the provisions of the order. An attorney suspended for more than 3 months or disbarred may not resume practice until a judge orders the attorney reinstated.
- (B) **Time of Application After Disbarment.** A person disbarred after hearing or by consent may not apply for reinstatement until 5 years from the disbarment's effective date.
- (C) **Petition for Reinstatement.** A disbarred or suspended attorney must file a petition for reinstatement with the chief judge. After receiving the petition, the chief judge may:
 - (i) waive further proceedings under this rule and order the disbarred or suspended attorney reinstated;
 - (ii) assign the matter for disposition before a judge without the appointment of investigating counsel under this rule; or
 - (iii) appoint investigating counsel under this rule, and assign the matter for disposition before a judge.
- (D) **Investigating Counsel's Duty.** In reinstatement proceedings where investigating counsel has been appointed, investigating counsel cross-examines the respondent/attorney's witnesses and submits any evidence opposing the petition.
- (E) **Deposit for Costs of Proceeding.** A respondent/attorney seeking reinstatement must include with the petition an

advance cost deposit in an amount to be set from time to time by the court to cover anticipated costs of the reinstatement proceeding.

(F) Conditions of Reinstatement. If the petitioner is found unfit to resume the practice of law, the petition is dismissed. If the petitioner is found fit to resume the practice of law, the judgment reinstates the petitioner, if the petitioner:

- (i) pays all or part of the costs of the proceedings;
- (ii) makes partial or complete restitution to parties harmed by the petitioner's conduct that led to the suspension or disbarment; and
- (iii) furnishes proof of competency and learning in the law, in the discretion of the judge before whom the matter is heard, if the petitioner has been suspended or disbarred for 5 years or more. Proof may include certification by bar examiners from another state or jurisdiction that the attorney successfully completed an examination for admission to practice after the suspension or disbarment date.

(G) Successive Petitions. No petition for reinstatement under this rule may be filed within 1 year of an adverse judgment on a petition for reinstatement filed by or on behalf of the same person.

(7) Service of Documents and Other Notices. Service of documents or other notices required or permitted under this rule will be made in a manner reasonably calculated to provide prompt advice to the intended recipient of the contents of the documents or other notice. No particular form of service is required.

(8) Prosecuting or Investigating Counsel's Appointment. When counsel is appointed under this rule, the judge appoints one or more members of this court's bar provided that lawyers employed with the Nebraska Counsel for Discipline should not be appointed. The respondent/attorney may move to disqualify an appointed attorney. Counsel will not be removed unless the respondent/attorney shows by the greater weight of the evidence that the prosecuting or investigating counsel is unlikely to perform his or her duties

consistently with the ethical standards stated in Nebraska General Rule 1.7(b). Once appointed, counsel may not resign without the judge's permission. The Federal Practice Fund pays counsel's fees and expenses.

(h) Policy on Uncivil and Unprofessional Conduct.

- (1) Generally.** Any attorney admitted to practice in this court, or any attorney who has applied for and been specially admitted to this court for a particular case, together with the judges of this court, are strongly encouraged to follow the court's Policy on Uncivil and Unprofessional Conduct. However, this policy is aspirational only.
- (2) Policy.** The court's Policy on Uncivil and Unprofessional Conduct states:
 - the litigation process, although adversarial in nature, should be nondiscriminatory and professional; all participants should be accorded fair, equal, and respectful treatment; to this end, the conduct of judges and lawyers should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms;
 - nondiscriminatory and professional conduct includes, as those terms are used in this policy, reasonable attempts by all participants to recognize and accommodate persons for family emergencies and responsibilities, as well as making reasonable accommodation for professional conflicts; and
 - conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently, and such conduct tends to delay and often to deny justice.

(i) Clerk's Duties.

- (1) Attorneys Convicted of Crimes.** When the clerk learns that an attorney admitted to practice before this court has been convicted of a crime, the clerk must determine whether the clerk of the court in which the conviction occurred has forwarded a certificate of the

conviction to this court. If a certificate has not been forwarded, the clerk must promptly obtain a certificate and file it.

- (2) **Discipline Imposed by Other Courts.** When the clerk learns that another court has disciplined an attorney admitted to practice before this court, the clerk must determine whether a certified or exemplified copy of the disciplinary judgment or order has been filed with this court, and if not, the clerk must promptly obtain a certified or exemplified copy of the disciplinary judgment or order and file it with this court.
- (3) **Notice to Other Courts.** If a person is still admitted to practice law in another jurisdiction or before another court after being (A) convicted of a crime by this court, or (B) disbarred, suspended, censured, or disbarred on consent by this court, the clerk must, within 14 days of that conviction, disbarment, suspension, censure, or disbarment on consent, send to the disciplinary authority in the other jurisdiction or court a certificate of the conviction or a certified or exemplified copy of the judgment or order of disbarment, suspension, censure, or disbarment on consent. The clerk must include in this notice the person's last known address.
- (4) **Notice to National Discipline Data Bank.** The clerk must likewise promptly notify the National Discipline Data Bank operated by the American Bar Association of any order imposing public discipline on an attorney admitted to practice before this court.