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JUL 8 1987

FILED

July 7, 1987

PERSONAL AND CONFIDENTIAL

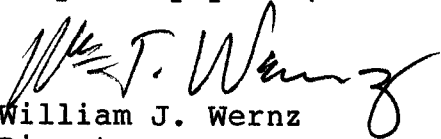
C1-84-2140

The Honorable Glenn E. Kelley  
Associate Justice  
Supreme Court of Minnesota  
State Capitol  
St. Paul, MN 55155

Dear Justice Kelley:

Enclosed for filing are eight copies of the joint Annual Report of the Director of Lawyers Professional Responsibility and the Lawyers Professional Responsibility Board which was approved by the Board at its June 26, 1987, Board meeting. The Board approved the draft as submitted to the Justices on June 10, 1987. The enclosed copies now contain the signature of the Board Chairman.

Very truly yours,

  
William J. Wernz  
Director

WJW/rlb  
Enclosures  
cc: Office of Appellate Courts

to SC Justices

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I. INTRODUCTION.

Rule 4(c), Rules on Lawyers Professional Responsibility, provides in part:

The Board shall prepare and submit to this Court an annual report covering the operation of the lawyer discipline and disability system.

Rule 5(b), Rules on Lawyers Professional Responsibility, provides in part:

The Director shall prepare and submit to the Board an annual report covering the operation of the Office of Lawyers Professional Responsibility . . . .

The Board's Report and the Director's Report are hereby jointly made.

This Report covers the period May 16, 1986, through May 31, 1987.

The most important accomplishments of the past year have been:

1. Completing implementation of changes in the professional responsibility system, as provided in amendments to the Rules on Lawyers Professional Responsibility accepted by the Supreme Court on the recommendation of its Advisory Committee; implementing numerous other recommendations of the Advisory Committee.
2. Working with the new Client Security Board to propose to the Court an economical way of providing staff services to the Client Security Board through the Office of Lawyers Professional Responsibility.

3. Studying carefully the complex insurance situation of the Board and Office, and taking the appropriate steps to obtain needed insurance coverages.
4. Petitioning the Court for further amendments to the Rules on Lawyers Professional Responsibility, adopted effective July 1, 1987, and designed to expedite procedures in the most serious discipline cases.
5. Promoting consistency in discipline matters by adopting summary dismissal guidelines, by beginning preparation of a Lawyers Board Panel Manual and by studying the new ABA Standards for Imposing Lawyer Sanctions.
6. Continuing progress in reducing delay in discipline proceedings.
7. Educating the bar and public through numerous presentations, through Bench & Bar articles, through the annual District Ethics Committee Seminar and through development of a new brochure.
8. Establishing committees of the Lawyers Board which have endeavored to deal with various concerns and problems.
9. Retaining qualified personnel.

## II. SUMMARY OF LAWYERS BOARD ACTIVITIES.

Last year's Report noted that there had been "a period of great change." Although there have been changes in the last year, the period is more noteworthy for its continuity.

### A. General Board Activities.

There has been little change in the composition of the professional responsibility system. The Board Chair and Executive Committee remain the same. The Director's Office employees are the same as those listed in last year's report,

except that one legal assistant and a law clerk have been replaced. Several senior Lawyers Board members (John Nys, Gwen Lerner, Tom Swain, Kathleen Stiegler) have completed their terms and another member (Nelia Lorentzen) has resigned. New Board members are attorneys Rollin Whitcomb, Gregory Bistram, Dennis Korman, and public members Alice Mortenson, Katherine Tarnowski and Darlene Radichel.

Stability and continued improvement have also characterized the statistics regarding disciplinary complaints and cases. Tables of cases in § III.A. below show this progress and stability, and show that cases have been handled more expeditiously in the last two years.

In the last year the Board and Director's Office have largely completed the implementation of the required or agreed-upon recommendations of the Supreme Court Advisory Committee. A report, summarizing this implementation, was filed with the Court and Committee on February 2, 1987. A goal stated last year was, "The full implementation of the accepted and mandated Advisory Committee recommendations will occur during FY'87."

The Board has been particularly concerned with promoting consistency in the handling of disciplinary cases and procedures. The Board and Director have studied and relied upon the ABA Standards for Imposing Lawyer Sanctions. The Board and Director's Office have adopted guidelines for issuing summary dismissals in certain recurrent kinds of cases, such as fee disputes, post-conviction claims of ineffective assistance of counsel, complaints about written solicitation, etc. Attached at A.1-8 is a copy of the guidelines. The Board has also begun to

develop a Panel Manual to promote consistency in procedures before Board Panels.

The Board has attempted to make further progress in dealing with the problem of delay in disciplinary cases by proposing certain changes in the Rules on Lawyers Professional Responsibility for adoption by the Supreme Court. The Court has adopted those changes, effective July 1, 1987. Copies of articles summarizing these rules changes and earlier changes effective July 1, 1986, are appended at A.9a-9h.

B. Lawyers Board Committees.

1. Insurance Committee.

A Board Committee, consisting of Joan Morrow, Tom Swain and George Flynn, devoted a considerable amount of time to studying the insurance needs and limitations of the Board and Director's Office. Paul Kinney, of the Executive Committee, also played an important role in identifying insurance needs. The result has been to take the steps necessary to purchase needed coverages. General liability insurance for the Office has been purchased. Issues regarding Workers' Compensation coverage will soon be resolved.

2. Rules Committee.

The Rules Committee, consisting of Elizabeth Ferguson, Rollin Whitcomb, Robert Shaw and Joan Morrow, has been extremely active. The Committee has reviewed the Lawyers Board Opinions in light of the new Rules of Professional Conduct. The Committee also has proposed an amendment to the disability rule, Rule 28, Rules on Lawyers Professional Responsibility. The Committee has considered, and will report on a proposed amendment to Rule 13, governing conditional admissions. The Committee reported to the Board on proposed changes to Rule 3.7, Rules of Professional

Conduct (involving imputation to law firms of advocate-witness disqualification).

3. Criminal Law Committee.

This Committee, composed of Michael Fetsch, Julius Gernes and George Ludcke, has met frequently to consider concerns of and allegations of certain members of the criminal law bar. The Committee reviewed the procedures used by the Director's Office in opening investigation files regarding criminal defense attorneys in certain situations and concluded that no change was required. A further report of the Committee regarding various matters is scheduled to be made to the Board at its June, 1987, meeting.

C. Budget.

No attorney registration fee increase occurred in FY'86 or FY'87 and none is projected for FY'88. FY'87 spending is currently projected to be \$893,000, or \$40,500 less than the approved budget of \$933,500.

A thorough budgeting process, involving several steps of review, has been adopted according to Board and Supreme Court policy and procedure. Paul Kinney, of the Executive Committee, who has extensive budget experience as a school administrator, works with the Director's Office in connection with budget reports and formulations. Annually, in March, a budget proposal for the next fiscal year is proposed in detailed form for the Board's approval and for the consideration of the Supreme Court director of administration. A budget for the next succeeding fiscal year is also developed and reviewed in tentative form. Both of these budgets have previously been considered by the

Executive Committee. In June, the Court then reviews these budgets, with any changes that have been made.

The FYE 6/30/88 budget was formulated and reviewed according to this method. A proposed \$10 attorney registration fee increase, effective 7/1/88, was approved by the Board. The Court later appointed an Attorney Registration Fee Committee to review the financial structure of all the Court boards. That Committee also approved the Board's budget and proposed fee increase. The Board filed a petition for approval of its budget, including the fee increase. However, it became apparent that the Client Security Board funding requirements were such that a substantial burden would be placed on every Minnesota lawyer in FYE 6/30/88. The Board Executive Committee determined, in February, 1987, to amend the budget, to request delay of the \$10 fee increase until 7/1/88, in order to lessen the burden on Minnesota lawyers. Necessary budget revisions were made and an amended petition filed. The Court approved the amended petition and delayed the fee increase for the Lawyers Board and the other Court boards.

### III. SUMMARY OF DIRECTOR'S OFFICE ACTIVITIES AND GOALS.

#### A. Casework.

The four tables below show statistics reflecting case types, numbers, dispositions and time for handling cases. The tables show generally continued improvement in most categories. In the last year and one-half there has been a great deal of stability in the most important case statistics.

With only two exceptions, all attorneys subject to complaints filed before 1985 have either had the complaints resolved, or the matters have been fully briefed or argued to the Supreme Court. One exception is an attorney who has been



temporarily suspended for several years, pending resolution of criminal charges and appeals. The other exception involves an admonition appeal stayed pending civil appeals determination. The older and more serious matters have now been completed or submitted to the Court.

Table I

	<u>12/31/84</u>	<u>12/31/85</u>	<u>12/31/86</u>	<u>5/31/87</u>
Total Open Files	686	417	406	413
Complaints Received Y.T.D.	1,069	1,244	1,233	475
Files Closed Y.T.D.	1,005	1,513	1,244	487
Cases at Least One Year Old	242	66	52	55

Of the year old cases pending on May 31, 1987, there were 17 files over one year old pending for Supreme Court decision, involving seven attorneys. There were 20 of the year old cases pending privately, not filed in the Supreme Court.

The large volume of files which result either in dismissal or in private discipline have generally been handled in a timely way, as shown in Table II below. A good deal of the credit for such timely handling is due to the volunteer efforts of the district ethics committees around the state. Another factor in the expeditious handling of cases is the increased use of summary dismissals, according to guidelines adopted by the Lawyers Board. The summary dismissal rate has been increased from 17% during the period 1982-1984, to 30% in 1985, to 34% in 1986, to 39% in 1987

(through May 31). The overall dismissal rate has remained constant, so that the increased summary dismissal practice appears to reflect better earlier yearly targeting of dismissal files, and the saving of volunteer investigative resources.

Table II  
Number of Months File Was Open at Disposition

	1984	1985	1986	1987 thru 5/31
Discipline Not Warranted/District Ethics Committee	6	6	4	4
Discipline Not Warranted/Director	11	13	6	6
Admonition	15	12	8	8
Private Probation	22	19	13	13
Sup. Ct. Reprimand	18	30	24	31
Sup. Ct. Probation	30	13	42	15
Sup. Ct. Suspension	27	30	27	16
Sup. Ct. Disbarment	35	11	13	--

Table III and IV below show the types of dispositions of complaints. Percentage correlations remain relatively constant among the general categories of dismissal and discipline, and the rate of public discipline has increased somewhat. The increasing numbers of complaints received has generally correlated with increasing numbers of attorneys, although in 1986 and 1987 to date the numbers of complaints have leveled off.

Table III

	Percentage of Files Closed			
	1984	1985	1986	1987 thru 5/31
1. <u>Total Dismissals</u>	82%	82%	82%	81%
a. Summary Dismissals	15%	30%	34%	39%
b. DNW/DEC	56%	36%	39%	32%
c. DNW/DIR	11%	17%	9%	10%
2. <u>Admonitions</u>	10%	7%	8%	13%
3. <u>Private Probation</u>	2%	4%	1%	1%
4. <u>Supreme Court Dispositions</u>	6%	6%	8%	5%
a. S. Court Dismissal	--	--	--	--
b. S. Court Reprimand	1%	1%	--	1%
c. S. Court Probation	1%	1%	--	1%
d. S. Court Suspension	3%	3%	3%	3%
e. S. Court Disbarment	1%	1%	5%	--

Table IV  
Supreme Court Dispositions 1976-1987  
Number of Lawyers

	Disbarred	Suspended	Probation	Censure and Reprimand	Dismissal	Other
1976	4	5	0	0	0	1
1977	1	2	0	1	0	0
1978	6	10	3	4	0	0
1979	6	4	2	3	0	0
1980	1	3	1	1	0	0
1981	3	4	1	1	1	0
1982	6	8	0	5	2	2
1983	4	4	0	3	2	1
1984	3	7	3	9	0	1
1985	4	15	13	10	3	1
1986	8	17	4	2	0	0
1987 thru 5/31	0	7	3	1	0	0

During the past year the Department of Revenue has operated under new procedures, resulting in the filing of numerous complaints against attorneys, for non-filing or non-payment of taxes. An article describing these matters is attached at A.10.

The office has opened files on 33 tax matters. Twelve files have been closed resulting in two admonitions, one Supreme Court suspension, one Supreme Court reprimand and eight dismissals. Of the remaining 21 files, petitions have been filed on four matters and charges have been issued on four matters. The remaining files are under investigation.

B. District Ethics Committees.

As a result of Recommendation 37 of the Supreme Court Advisory Committee on Lawyer Discipline, the Director's Office devised an annual report form to be completed by district ethics committees. In 1987 each district ethics committee filed such a report with a roster of their members.

In 1986, 549 files were investigated by district ethics committees. Dismissal was recommended in 451 files, 73 recommended an admonition, 15 recommended the matter be referred to a Panel and 10 recommended further investigation.

The average number of months a file is in the district committees remains at approximately 1.6 months.

The Rules on Lawyers Professional Responsibility amendments adopted on July 1, 1986, require DEC investigators to include in their report a draft memorandum when recommending discipline not warranted or admonition. This has been working well and saves drafting time in the Director's Office.

C. Administration.

**Office Space.** In August, 1986, the Office quarters were moved to 520 Lafayette Road. In addition to the physical move, it was necessary to obtain and design suitable space. The move was accomplished with a minimum of disruption, and the space is more usable and hospitable than the earlier office space. The availability of a hearing room within the new space has lessened a fairly substantial administrative burden of locating hearing room space.

**Computer.** Implementation of the computerization of various case matters in the Office has continued. Attached (with case names deleted) are samples of several of the reports newly available through computerization (A.11-14). A proposal has been approved for acquisition of a Macintosh computer and additional word processing equipment.

**Budget.** The budgeting process has been formalized in several ways. Paul Kinney, of the Executive Committee, has continued to be involved in the process, and a Supreme Court Policy and Procedure now requires various submissions at certain times. Income was projected within about five percent of receipts for FY'87 to date. Spending will be under budget in FY'87 because of intentional delays in hiring, a maternity leave, and the decision to delay other spending in order to accommodate the delay in an attorney registration fee increase, occasioned by the Client Security Board assessment.

**Insurance.** As a result of a Board Committee study, general liability insurance has been purchased. A

determination will soon be made on the purchase of worker's compensation insurance. This remedies a serious problem of liability exposure for the office.

**Office Manual.** The Office's manual for policy, procedure and forms has been in part re-organized to make it more accessible and orderly.

D. Personnel.

Attached at A.15-16 are, respectively, the current Office organizational chart and the chart submitted with the 6/2/86 annual report. The only changes are that Kevin Slator has been promoted to Legal Assistant Supervisor to replace Mary Danforth, and a new law clerk has been hired. The stability in personnel, both in overall numbers and in the identity of persons, shows that a problem of turnover has been resolved. The numbers of new employees (including law clerks) hired for permanent positions (new and replacement) in this Office for the years 1981-87 are:

<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>
11	7	8	20	9	3	1

In 1987 there have been two resignations and there is one new position; three hirings are expected. A procedure has been developed for departing employees to meet with the Executive Committee liaison, Fenita Foley, the employee's supervisor and Judy Rehak. The stability of employees has no doubt been of great benefit in productivity, consistency, dependability and for the overall harmony of the system.

E. Education.

As indicated in detail in the report attached at A.17, there are numerous appearances before the bar and public groups by people in this office, the regular Bench & Bar column, the annual District Ethics Committee Seminar and the hundreds of advisory opinions, all of which are part of the accomplishment of our educational objectives.

Last year's report stated, ". . . A goal will be to develop a brochure describing the operations of this Office for complainants, respondent attorneys and other interested parties." A copy of the brochure is attached at A.18-19. Copies of the brochure are distributed to complainants and other interested parties.

During FY'88 a goal of this Office will be to develop materials to distribute to Minnesota attorneys explaining and illustrating in detail appropriate trust account books and records and procedures.

IV. DEPARTMENT REPORTS.

Attached (A.20) is an article generally describing the role of probation in the professional responsibility system.

A. Probation.

1. File Totals.

Total probation files as of 1/1/86	75
Probation files opened in 1986	15
Probations closed in 1986	21
Total probation files as of 1/1/87	69

2. 90 attorneys were on probation during some portion of 1986.

a. 34 Court-ordered probations  
23 supervised

11 unsupervised

b. 56 stipulated private probations  
24 supervised  
32 unsupervised

3. Files Involving:

Client-Related Violations	57
Non-Client-Related Violations	33

4. Areas of Misconduct\*

Neglect	35	Conflict of Interest	9
Disability	12	Taxes	4
Alcohol	8	Illegal Fees	4
Psychological	4	Criminal Conduct	3
Books and Records	10	Failure to Return Client	
Misrepresentation	13	Property/Files	3
Non-cooperation	8	Misappropriation	2

\* A file may include more than one area of misconduct.

5. 21 Closings in 1986

Successfully completed probation	15
Probation revoked	6

COMMENT

The probation department consists of an Assistant Director, a legal assistant, and such clerical help as is necessary to administer the probation department. In 1986, approximately 146 legal assistant hours and 100 attorney hours were expended in monitoring probation.

The following routine duties by the probation department insure monitoring of attorneys placed on probation.

1. Notify the respondent, respondent's counsel, if any, and complainant that respondent has been placed on probation.

2. Diary all terms and conditions respondent must meet to successfully complete probation. Monitor and note respondent's compliance with terms as they are fulfilled.



3. If the probation is to be supervised, respondent is requested to nominate a probation supervisor for the Director's approval. The approved supervisor is requested to report to the Director's office regarding respondent's compliance with the terms and conditions of his probation.

4. Quarterly supervisors' reports are reviewed by the Assistant Director. The Director is notified of any reported problems. Problems are acted upon by the Assistant Director.

5. Upon completion of probation, respondent's file is reviewed to assure that respondent has fully complied with all the court-ordered or stipulated terms of probation.

6. If respondent has fully complied with all the terms of the probation, the probation is deemed successful and the probation is completed. The respondent and supervisor are notified of the termination of probation and the file is closed.

**B. Advisory Opinions.**

A total of 875 telephone inquiries were received in 1986. This represents a slight increase from the 822 received in 1985. The percentage of inquiries receiving "no opinion," pursuant to Board policy, remained unchanged from 1985.

During 1986, 711 telephone opinions and 40 written opinions were issued, requiring 443.5 attorney hours. Written opinions were most frequently issued to confirm telephone opinions responding to complex inquiries. The advisory opinion attorneys received 299 hours of assistance from the law clerks (administrative duties - 55%; research - 31%; and initial drafting - 11%).

The most frequent subject matters of inquiry in 1986 were:

Conflicts of interest	-	21%
Client confidences	-	8%
Files	-	7%
Withdrawal	-	6%

Two additional attorneys now share the advisory opinion department (for a total of three) to increase availability of opinions. Total attorney and law clerk hours devoted to the advisory opinion service in 1986 were decreased by approximately 100 hours even though more inquiries were received and more opinions were issued.

C. Judgments and Collections.

The judgments awarded and costs collected have both declined from an unusually high 1985 level. However, effective July 1, 1987, the Supreme Court has amended Rule 24(a), RLPR, to increase costs awarded in each case from \$500 to \$750; and has amended Rule 15(a) to allow bad faith attorney fees.

1.	Costs Awarded (26 attorneys)	\$15,840.91
2.	Costs Collected (14 attorneys)	\$ 7,561.66
3.	Costs Collected in 1987 for 1986 Dispositions	\$ 800.00
4.	Unpaid Judgments (1980-1986)	\$35,415.35
5.	National Discipline Data Bank Reports	26

D. Professional Corporations.

Following are the statistics for the professional corporation department as of 5/5/87:

1.	Annual Reports Received	
	711 @ \$25	\$17,775
	37 @ \$100	<u>3,700</u>
		\$21,465
	1 @ \$150 (1983-5)	\$ 150
	4 @ \$100 (1985)	400
	1 @ \$125 (1980-5)	<u>125</u>
		\$ 675
	Total Deposits	<u>\$22,150</u>

2.	TOTAL ATTORNEY HOURS	23
3.	Total Non-attorney Hours	<u>179.75</u>
		202.75

E. Complainant Appeals.

On July 1, 1986, Rule 8(d), RLPR, regarding the complainant appeals was revised to allow appeals to be reviewed not only by Panel Chairpersons but also by public Board members. In addition, the amended Rule gave the reviewing Board member the option of recommending that further investigation be undertaken.

During 1986, the Director's office received 198 complainant appeals, compared to 242 such appeals in 1985. This is approximately 16 percent of files closed, as it was in 1985. Board members made 163 determinations, nine of which recommended further investigation and two of which were directed to be heard before a panel. The remainder affirmed the Director's disposition. A total of 149 clerical hours were spent in 1986 processing the appeal files, as well as an unrecorded amount of attorney time.

F. Disclosure.

1. Source and Number of Requests for Disclosure.

	<u># of Requests</u>	<u># of Attorneys</u>	<u># of Complaints<sup>1</sup></u>	<u>Discipline Imposed<sup>1</sup></u>	<u>Matters Pending<sup>1</sup></u>
1. Nat'l Conf. of Bar Exam.	112	112	21	4	1
2. Individual Attorneys	11	11	4	0	0

3. Local Referral Services	32	224	0	0	1
4. Governor's Office	8	54	45	3	2
5. Other State Disc. Counsels of Bar Offices	30	31	11	1	0
6. F.B.I.	<u>18</u>	<u>18</u>	<u>0</u>	<u>1</u>	<u>0</u>
TOTAL	211	450	81	9	4

1/ Rule 20 Revision  
 Rule 20, which governs disclosure, was revised in 1986 to require complaints dismissed with discipline not warranted be disclosed only to the lawyer affected. This change was implemented for statistical purposes in July, 1986. We now disclose only discipline imposed or matters pending, except where an individual attorney requests information to be sent directly to him or her.

2. Department Function and Procedure.

The disclosure department consists of one attorney, one legal assistant, and the panel clerk. The department responds to requests from various sources for information about an attorney's disciplinary record. Formerly, all complaints including those dismissed without discipline were summarized and disclosed. Rule 20 was revised on July 1, 1986, to permit disclosure of dismissed complaints only to the lawyer affected.

The July 1, 1986, rule change regarding disclosure of dismissed complaints has also decreased the legal assistant and attorney hours spent on the disclosure department. For the twelve months preceding the rule change the legal assistant spent 4.25% of his time on disclosure, or an average of 1.7 hours per

week. Excluding July and August, 1986 (when time spent increased dramatically to implement the new rule), the legal assistant has spent 1.57% or .63 hours per week on disclosure since the rule change. Although precise figures are not known, the drop in attorney time has been equally dramatic.

The disclosure department also responds to the public who make telephone requests for public discipline imposed against attorneys.

V. FY'88 GOALS AND OBJECTIVES.

A. Casework.

The volume of complaints is such that it is not realistic to expect any significant improvement in the overall number of cases on hand. With 1,200-1,300 new complaints yearly, an average number of open files of about 400-500 is to be expected. The time for handling fully litigated Supreme Court cases, and a number of pending collateral proceedings which must be completed before Lawyers Board proceedings can go forward, implies that there will always be a significant number of year old cases. The only realistic goal is to maintain levels of cases on hand and year old cases at or about current levels, and to recognize that factors beyond the Office's control could cause some increase in these levels--for example, a sharp increase in the number of complaints or a small number of new, very complicated investigations or litigations. It is expected that there will continue to be approximately 30 Supreme Court disciplinary orders a year (involving significantly more than 30 files), and that most of these matters will be on the year old list during part of their pendency.

B. Personnel.

We will continue to hope that employees can be retained and work productively by promoting a congenial work atmosphere, assigning employees duties commensurate with their abilities, responding to grievances fairly, and promoting employees as their abilities and opportunities permit.

A personnel matter that should be addressed and resolved in FY'88 is that of disqualification of former attorneys from representing respondent attorneys in certain situations. A policy developed in 1984 has been in effect, but a Board Committee is considering a replacement policy.

C. Administration.

**Computer and Word Processing.** We have been studying our computer and word processing configuration with a view to making a significant realignment in FY'88. We believe that the cost and capability of personal computers and the availability of extensive software is now such that we proposed acquiring one or two PCs in FY'88 for several uses. This proposal was recently approved. We expect to use a Macintosh computer for budgeting, trust account analyses and certain departmental word processing tasks. We will delay hiring new word processing personnel authorized in the budget while the productivity of new equipment is assessed.

**Budget.** We believe it would be desirable to computerize our budgeting operation, particularly because the Supreme Court policy of using employment anniversary dates for merit increases, and the other Court policy of having a cap on annual salary increases, makes budgeting much more complicated than it was previously.

Client Security Board (CSB). A major endeavor will be to integrate the CSB function into this Office administratively. Development of appropriate forms, telephone arrangements, filing arrangements, additional word processing capability, budgeting process, reporting process, etc., will all be necessary beginning 7/1/87.

Insurance. Completing the worker's compensation insurance analysis, proposal and purchase.


Office Manual. Completing re-organization project.

D. Public Relations and Working Relationships.

1. Completion of the Lawyers Board Panel Manual.
2. Continuing a harmonious relationship with the Supreme Court.
3. Completing the trust account instructional materials for dissemination to Minnesota attorneys, and otherwise continuing the Office's educational efforts.

Dated: June 10, 1987.

Respectfully submitted,

  
\_\_\_\_\_  
JOHN D. LEVINE  
CHAIRMAN, LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD

and

  
\_\_\_\_\_  
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PERSONAL AND CONFIDENTIAL

MEMORANDUM

TO: The Lawyers Professional Responsibility  
Board Executive Committee

FROM: William J. Wernz  
Director

DATED: August 1, 1986

RE: Summary Dismissal Guidelines

I. INTRODUCTION.

Several recent developments make it desirable to have the Lawyers Board approve uniform guidelines for summary dismissals by the Director's Office. "Summary dismissal" means that the Director determines from the complaint itself, without any investigation at all, that discipline is not warranted in a particular matter. The complainant is not interviewed, the respondent attorney is not asked for a reply; the file is summarily closed, subject to the complainant's right to appeal. Summary dismissals of complaints against attorneys have always accounted for a significant percentage of the final decisions by the Director. The following developments make establishment of uniform policies desirable.

II. RECENT DEVELOPMENTS.

A. Supreme Court Advisory Committee.

Recommendation 5 of the Supreme Court Advisory Committee was:

The Director should adopt a policy requiring complainants to exhaust their remedies in readily available alternative forums before initiating a disciplinary investigation. Criminal matters in which



the complainant-defendant should pursue post conviction relief proceedings are an example of the type of case which should appropriately be diverted. (p. 20)

The Committee also recommended diversion to alternative forums of fee disputes and complaints that appear to be solely of possible malpractice. The Supreme Court "adopted" its Advisory Committee's Report, although it is unclear whether this adoption means approval of every recommendation.

B. Increase in Summary Dismissal Rate.

During the period 1982 through 1984, the summary dismissal rate averaged about 20 percent of all files closed. During 1985-6 the summary dismissal rate has increased to about 35 percent of all files closed. It should be noted, however, that the overall dismissal rate (that is summary dismissals plus dismissals after investigation), remains at just over 80 percent of all files closed, as it has for many years. This suggests that the complaints dismissed summarily would generally have been dismissed had there been investigations. The increased summary dismissal rate may, however, give some cause for concern--complainants may perceive the system to be unfair, and it may be that further investigation of some matters is warranted.

C. Amendments to the Rules on Lawyers Professional Responsibility.

The amendments to the Rules, effective July 1, 1986, increase the "supervisory" role of the Executive Committee and the Lawyers Board over the general operation of the Director's Office. The Board and Committee are not normally involved in exercises of the Director's discretion whether to investigate or charge a particular matter. Amendments have been made, however, to involve the Committee in the decision whether to investigate matters when no complaint has been received, and to involve Board members in such charging decisions as whether to supplement a petition for disciplinary action. The supervisory authority of the Board and Committee would not be directly involved in individual summary dismissal determinations, except through the complainant appeals process. However, the allocation of resources and the overall criteria for general categories of summary dismissal are appropriate supervisory involvements of the Board and Committee. It may be noted that the New Jersey Office of Attorney Ethics has summary dismissal guidelines adopted and approved by the New Jersey Supreme Court.

D. Amendments to Complainant Appeal Process.

The Court amended Rule 8(d) in two ways: (1) To allow the Board Chair to appoint a group of Board members to review complainant appeals. The Chair has appointed a group larger than just the Panel Chairs. This means that there is more of a need for uniform standards to guide a larger group of decision-makers. (2) The Court added to Rule 8(d) the option that the reviewing Board member could direct further investigation. Presumably this option would be exercised most often in appeals of summary dismissals; again, the need for uniformity becomes apparent.

III. PROPOSED GUIDELINES.

In proposing the following guidelines, it is understood that discretion is expected in applying them. There may be examples of alleged misconduct of a type which would ordinarily not be investigated, but because of its alleged flagrant nature at least some investigation is warranted. There may also be unusual circumstances that suggest investigation of allegations which might otherwise not be investigated.

Form paragraphs have been adopted by this office for most of the proposed guidelines. These paragraphs are set out below.

A. General Standard.

If a complaint makes allegations which, when assumed to be true, still do not state a violation of the Minnesota Rules of Professional Conduct, the complaint will ordinarily be summarily dismissed. One example would be an allegation that an attorney used profane language. However, there could be situations in which a lawyer was abusive, in violation of Rule 4.4, "Respect for Rights of Third Persons." Another example of a complaint which does not state a disciplinary rule violation would be the claim that the attorney for a complainant's opponent in litigation did not respond to the complainant's telephone calls. No rule requires such responses.

B. Fee Disputes.

The Minnesota State Bar Association has established fee arbitration committees in each area of the state. Routine fee disputes are referred to these committees on a regular basis. However, the Rules of Professional Conduct tighten the disciplinary standards for fee matters in several ways. Also,

Rule 1.5(a), Rules of Professional Conduct, provides, "A lawyer's fee shall be reasonable." This is a tighter standard than the former DR 2-106(A), which forbade, "An illegal or clearly excessive fee."

Even under the old disciplinary rule, attorneys were disciplined for charging unauthorized worker's compensation fees; probate fees based solely on a percentage; and accepting retainers without providing any significant services. Most fee complaints will be summarily dismissed, either because a court (e.g., probate, bankruptcy) routinely reviews such fees, or because another forum (fee arbitration or the civil courts) would be a better forum. However, clear violations will be subject to discipline.

Fee disputes usually take the form of a complaint that the attorney's services were not worth the amount charged, that the attorney "ran up the bill" unreasonably, or that the attorney promised the total bill would not be over "X" amount, etc. Along the same line are complaints primarily requesting refunds of claimed unearned portions of retainer fees. The issue is simply how much the client must pay. This office has no special expertise in determining this issue and fee arbitration exists solely for this purpose already.

#### FEE DISPUTES FORM DISMISSAL PARAGRAPH

This complaint involves a dispute concerning legal fees. In 1985, the Supreme Court Advisory Committee strongly recommended that the limited resources of this office not be used to review fee disputes. Most fee disputes do not involve alleged unethical conduct or conduct which violates the Rules of Professional Conduct. Most fee disputes are better resolved through court action or fee arbitration. The Minnesota State Bar Association has established fee arbitration committees around the state to help resolve disputes between attorneys and clients concerning legal fees. Fee arbitration procedures are often quicker, cheaper, and less formal than court proceedings. The cases are usually heard by a panel consisting of one attorney and two non-lawyers. Not every fee dispute can be submitted to the fee arbitration boards. To determine whether complainant's case can be submitted to fee arbitration, and for further information about fee arbitration procedures, complainant should contact:

☒ (Here the fee arbitration chair's address and phone number are set out.)

C. Malpractice Complaints.

The Advisory Committee recommended summary dismissal of complaints involving "only possible malpractice." At about the same time the Court adopted a new Rule of Professional Conduct, Rule 1.1, providing, "A lawyer shall provide competent representation to a client." Competence has become more clearly an ethics requirement, but claims of incompetence are more routinely to be decided outside the disciplinary process.

The Director's Office has exercised discretion in this situation by more regularly referring complaints alleging malpractice to civil forums. There are, however, limits to this policy. The purpose of a civil malpractice action is to provide an award of damages to one who has been harmed by a lawyer's negligence. The purpose of disciplinary proceedings is to protect the public, as well as the bench and bar. A malpractice claim which suggests gross incompetence, a habitual pattern, or intentional wrongdoing indicates the possible need for protection in the future, in the form of discipline. An allegation of an isolated and inadvertent mistake, such as an untimely filing of a pleading, would normally be summarily dismissed, and the complainant advised to seek private counsel.

Somewhat similar standards are applied to claims of bad faith litigation and pleadings, and failures to obey court orders. This office will normally refer the latter kind of complaint to the court whose order has allegedly been violated. Complainants who allege bad faith litigation and pleadings will normally receive summary dismissals with citations to the potentially applicable remedies under the Rules of Civil Procedure or statutory bad faith remedy. The summary dismissal will be without prejudice, so that if the civil court does find bad faith or the like, the complaint can be re-submitted for possible discipline.

MALPRACTICE DISMISSAL FORM PARAGRAPH

This complaint involves allegations of attorney negligence or malpractice. In 1985, the Supreme Court Advisory Committee on attorney discipline strongly recommended that complainants whose complaints primarily alleged malpractice be referred to their civil remedies. The recommendation was based on the limited resources of this office and the availability of the civil courts for determining malpractice claims. Not all acts of alleged malpractice involve conduct which violates the Rules of Professional Conduct. Malpractice claims typically involve

claims of poor quality representation rather than conduct which is allegedly unethical.

D. Non-payment of Professionally-Incurred Indebtedness.

Routine claims that attorneys have not paid debts are summarily dismissed, whether the complainant is a professional (such as a court reporter) or a private creditor. Opinion No. 7 of the Lawyers Professional Responsibility Board at one time made this conduct subject to discipline. That opinion has been repealed. Our office will investigate situations where there is an unsatisfied judgment against the attorney, since this may raise more serious questions concerning the attorney's honesty or interference with the administration of justice. Otherwise, we cannot act as a collection agency, and we have no legal authority to order payment by an attorney to another party. In most situations where litigation expenses are unpaid, it may well be the client's ultimate obligation to pay those expenses in any event, not the attorney's.

PROFESSIONALLY-INCURRED INDEBTEDNESS DISMISSAL FORM PARAGRAPH

The Director's office does not condone the nonpayment of professionally incurred indebtedness by attorneys. This office cannot, however, involve itself in every such matter lest it become a collection agency instead of a disciplinary office. Accordingly, this office has limited its involvement to those cases where there is an unsatisfied judgment or where there are other aggravating circumstances. The complaint is, therefore, dismissed with leave to refile it if complainant should obtain a judgment against respondent for the indebtedness mentioned in the complaint.

E. Advertising and Written Solicitation.

A number of Minnesota and United States Supreme Court decisions have held that lawyers may advertise in various ways. Rules of Professional Conduct have been amended in Minnesota to embody these developments and also to allow written solicitation of legal business. Generally speaking, if advertising is not misleading, or if solicitation is not personal, there is no basis for discipline.

ADVERTISING DISMISSAL FORM PARAGRAPH

The United States Supreme Court has held that lawyers are permitted to advertise. Minnesota Supreme Court rules allow

lawyers to use written communications including direct mail to advertise and to solicit. A letter offering legal services does not itself violate the Disciplinary Rules. In reviewing respondent's letter, there is nothing in it which on its face appears to be false, fraudulent, deceptive or misleading. Accordingly, a finding that discipline is not warranted must be made.

F. Personal Behavior Outside the Practice of Law.

Although this Office's jurisdiction is not limited to attorney behavior within the practice of law, discretion has been exercised so that there is no investigation of many allegations regarding the private lives of attorneys. If an attorney was allegedly involved in criminal or fraudulent activity outside the practice of law, this Office would normally investigate. There are, however, no rules requiring attorneys to be gentlemen, good citizens, kindly landlords, careful drivers or faithful spouses. Accordingly, a number of complaints are dismissed with the following paragraph.

PRIVATE CONDUCT DISMISSAL FORM PARAGRAPH

The subject of the complaint is the respondent attorney's allegedly improper actions outside the practice of law. This office has jurisdiction to consider allegations of attorney misconduct whether or not the actions were in the practice of law. Matter of Scallen, 269 N.W.2d 834, 841 (Minn. 1978). The Director of this office also has discretion, however, to "make such investigation as he deems appropriate as to the conduct of any lawyer or lawyers." Rule 8(a), Rules on Lawyers Professional Responsibility. In general, discretion has been exercised to use the limited resources of this office to investigate allegations of attorney misconduct in non-attorney matters only when the allegations, if true, would constitute serious misconduct reflecting adversely on the attorney's fitness to practice law. See Comment to Rule 8.4, Rules of Professional Conduct: ". . . a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice." In this matter, the Director's office has determined that no investigation will be conducted.

G. The Criminal Process: Prosecutorial Discretion and Criminal Defendants' Post-Conviction Relief.

Complaints concerning a prosecutor's discretion whether to charge a certain individual with a crime, or to conduct his or

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her investigation or trial in a certain way, normally are summarily dismissed under the standard of prosecutorial discretion. We do not "second-guess" a prosecutor's discretionary decisions. A prosecutor has limited resources and must make decisions on how best to allocate those resources.

Many criminal defendants make allegations in the nature of ineffective assistance of counsel claims, which are properly raised either through the appellate process or in federal court on habeas corpus petitions. The basis for summarily dismissing such claims is similar to the rationale behind dismissing malpractice claims, in that it is the quality of the lawyer's representation that is being challenged, not a specific violation of the Rules of Professional Conduct. Another rationale for summarily dismissing such complaints is that they usually involve review of a voluminous trial transcript and exhibits, not readily available to this office, and involving the use of significant resources by this office.

#### IV. UNINTELLIGIBLE COMPLAINTS.

Sometimes a complaint is received which is either unintelligible or it is difficult to discern the exact nature of the allegations. Rather than summarily dismissing such complaints, this Office writes to ask the complainant for more information. See attached sample form letter. If no reply is received, no file is opened, or, if it seems appropriate, there is a summary dismissal.

#### V. CONCLUSION.

Summary dismissal guidelines approved by the Board would be published in the Director's Bench & Bar column. A news release to the general media might also be appropriate. Judges, attorneys and the interested public would then be aware of some of the more common standards applied to certain kinds of ethics complaints.

WJW/rlb

# Amendments to the Rules . . .

Effective July 1, 1986, the Rules on Lawyers Professional Responsibility have been extensively amended by order of the Minnesota Supreme Court. These amendments affect the procedural rules governing lawyer discipline investigations and proceedings. The amendments do not affect the substantive Rules of Professional Conduct which establish the ethical standards governing the profession. Attorneys subject to disciplinary investigation or charges, and those who represent them, should closely review the amendments.

The procedural Rules on Lawyers Professional Responsibility were last comprehensively amended in 1982. The present amendments, while significant in many respects, do not alter most of the fundamentals of the discipline and ethics system.

The amendments to the rules are largely a product of the Report of the Supreme Court Advisory Committee on Lawyer Discipline, chaired by Nancy Dreher. The committee and the Lawyers Board consulted closely, and the Court applauded both for their efforts. The report, originally filed in April 1985 and supplemented in December 1985 was the subject of public hearing before the Court in March 1986. The committee heard from many interested individuals and groups before issuing its report. The Court adopted the report as well as most of the rule changes it recommended. In addition to proposed rule changes, the report contained numerous administrative and other recommendations, many of which have been implemented informally.

The significant changes in the rules amendments may be summarized in three categories:

1. Changes and classifications in the structure of the discipline system.
2. Changes in litigation procedures.
3. Changes in rules for dismissed complaints.

## Structure, Accountability, and Decentralization

The advisory committee was concerned to clarify the roles of the several individuals and groups in the

professional responsibility system and to enhance the roles of the district ethics committees and the Lawyers Board executive committee in particular. It is now clear that the director is accountable directly to the Lawyers Board (R. 5(b)) and that an executive committee of the Lawyers Board is responsible for the "general supervision" of the director's office (R. 4(d)). The supervisory functions of the

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*"Attorneys subject to disciplinary investigation or charges, and those who represent them, should closely review the amendments."*

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executive committee preclude its members from performing any adjudicative functions on Lawyers Board panels (R. 1(3)). The director's authority to initiate investigations without a complaint is retained, but now requires the executive committee's prior approval (R. 8(a)). The board reviews the director's performance biennially, and makes a recommendation to the Court regarding continuing service (R. 5(a)).

The district committees, Lawyers Board, and Lawyers Board panels are all encouraged to develop and utilize the expertise of their members in particular areas of law (R. 3(a), R. 4(a), R. 4(f)).

The volunteer district ethics committees of the bar association are to draft the dismissals or admonitions they recommend to the director (R. 7(b)). The district investigator's report is available from the director, after committee consideration, on request of the lawyer affected (R. 6(c), 7(b)). The reports of the district committee investigators are to be reviewed within the committee before submission to the director (R. 7(b)).

## Litigation Procedures

The advisory committee report generally recommended more procedural protections for lawyers accused of unprofessional conduct. Most of these recommendations were adopted in some form.

Lawyers Board panels conduct preliminary screening hearings to determine whether there is probable cause to believe a public petition for discipline should be filed. The amendments provide that the probable cause standard should be applied to "each" and every charge (R. 9(h)(1)). Before this amendment the rules provided that the hearing would be terminated when probable cause was found on any charge. Supplemental charges in public petitions for disciplinary action, filed after panel hearing, must be approved in advance now by a panel chair (R. 10(d)). The executive committee adjusts random panel assignments to balance workloads or utilize expertise (R. 4(f)). The Court did not adopt the proposal that panels' dispositional options be expanded beyond the probable cause determination.

Rule 19, regulating evidentiary use of prior disciplinary proceedings, has been thoroughly restated. Previous dismissals are admissible only to show a pattern of misconduct. Previous disciplines are admissible regarding the degree of discipline to be imposed, but their admissibility is otherwise restricted roughly in accord with Rule of Evidence 404.

Rule 25, requiring a lawyer to cooperate in disciplinary investigations and proceedings, has been amended to codify certain practices. Challenges to a Rule 25 request must be made promptly and in good faith before the Ramsey County District Court. Rule 25 requests shall not be disproportionate to the matter being considered, just as Rule of Civil Procedure 26.07 limits discovery burdens. Copies of documents are now permitted.

Several miscellaneous changes in litigation procedure should be noted by practitioners. Seven, rather than nine, copies of the petition for disciplinary

action and answer are now required (R. 12(a), R. 13(a)). In various court proceedings when the underlying matter is still confidential, the lawyer is to be identified by a number or random initials (R. 9(d), (g), (k), and (l); R. 25(a)). The director's office will assign to each panel matter a number to facilitate this process. The prohibition against *ex parte* contacts, found in the Rules of Professional Conduct and Code of Judicial Conduct, is restated in Rule 29, and a limited emergency exception is established. The disqualification criteria for judges will now be applied to Lawyers Board and district committee members (R. 4(e), R. 6(a)).

## Dismissed Complaints, Disclosure, Expunction and Complainant Appeals

Files of dismissed complaints against attorneys will now be destroyed after three years, rather than five years (R. 20(b)(4)). All records will then be destroyed, including docket information. For purposes of disclosure (e.g., bar admissions to other states, judicial candidates), dismissed complaints will now not be disclosed by the director's office, even with authorizations to disclose (R. 20(a)). The purpose of this amendment is to ensure that no lawyer is adversely affected by information regarding a dismissed complaint.

Complainants' appeals of dismissed complaints (and of privately imposed discipline) will now be considered by an expanded group of Lawyers Board members (R. 8(d)). The reviewing board member will now have the authority to require further investigation.

The rules amendments were proposed to enhance fairness, accountability, and broader sharing of responsibility in lawyer discipline matters. The amendments are without doubt the product of an enormous amount of diligent effort, constructive debate and consideration by all those affected by the professional responsibility system in Minnesota.

*(The revised Rules on Lawyers Professional Responsibility are reproduced below at page 29. Ed.)*



## FURTHER AMENDMENTS TO THE RULES

Effective July 1, 1987, the Rules on Lawyers Professional Responsibility have been amended by order of the Minnesota Supreme Court. These amendments are not nearly as extensive as the 1986 amendments, which implemented certain recommendations of the Supreme Court Advisory Committee. The current amendments affect the procedural rules governing lawyer discipline investigations and proceedings. The amendments do not affect the substantive Rules of Professional Conduct which establish the ethical standards governing the profession.

The current rules amendments were proposed by the Lawyers Professional Responsibility Board, principally to expedite proceedings in the most serious cases of alleged unprofessional conduct. There was no opposition to these proposals. The Court modified the proposals only slightly and added one change on its own motion.

The most significant changes in the rules may be summarized as follows:

1. Expanding the situations in which the preliminary Panel hearing may be bypassed.
2. Protecting Director's work product, particularly opinion work product, and Board communications, from unwarranted discovery efforts.
3. In extraordinary circumstances, allowing for a referee to perform a Panel's function, or a Panel to perform the referee's function.

4. Providing for temporary suspension of the lawyer's license upon a referee disbarment recommendation.

5. Miscellaneous changes.

Bypassing Panel procedures. A new Rule 10(d) was adopted, providing:

(d) Other serious matters. In matters in which there are an attorney's admissions, civil findings, or apparently clear and convincing documentary evidence of an offense of a type for which the Court has suspended or disbarred lawyers in the past, such as misappropriation of funds, repeated non-filing of personal income tax returns, flagrant non-cooperation including failure to attend a pre-hearing meeting, fraud and the like, the Director may either submit the matter to a Panel or upon a motion made with notice to the attorney and approved by the Panel chair, file the petition under Rule 12.

Rule 10 previously allowed for dispensing with preliminary probable cause Panel hearings upon agreement of the parties, certain admissions or certain criminal convictions. Because a finding of probable cause to believe public discipline is warranted was routine and virtually automatic in certain kinds of situations, Rule 10(d) was added so that the Panel would not have to convene on such matters. Instead, a Panel Chair may on motion hearing approve the filing of a public petition in certain situations described in the rule. The rule change will correct such problems as Panel members convening from different parts of the state for a hearing at which the attorney does

not appear, and has not appeared for or cooperated in any preliminary investigation or proceeding. Nor will a Panel have to convene for the preliminary hearing when an attorney has admittedly failed to file tax returns or admitted other serious misconduct.

**Work product and discovery protection.**

In the last few years there have been several attempts to depose the Director, staff members or Board members, and to obtain the Director's work product. These efforts were the subject of extensive motion practice and were largely unsuccessful. Rule 20(a) has been amended to provide:

(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:

\* \* \*

(4) Upon request of the lawyer affected, the file maintained by the Director shall be produced including any district committee report; however, the Director's work product shall not be required to be produced, nor shall the Director or Director's staff be subject to deposition or compelled testimony, except upon a showing to the court issuing the subpoena of extraordinary circumstance and compelling need. In any event, the mental impressions, conclusions,

opinions and legal theories of the Director and Director's staff shall remain protected.

\* \* \*

(7) Nothing in this rule shall be construed to require the disclosure of the mental processes or communications of the Committee or Board members made in furtherance of their duties.

The purpose of the rule is to protect unwarranted and burdensome discovery tactics in the discipline context.

New referee and Panel functions. The preliminary probable cause Panel hearing is held in front of volunteer Board members. When a matter is unusually complex, it may be unfair to ask volunteers to review voluminous documents, hear numerous witnesses and sit in hearing for several days. It may also be unfair to ask witnesses and litigants to go through both the Panel hearing and (if there is a probable cause determination), go through a similar public hearing before a Supreme Court referee. To deal with such extraordinary situations, a new Rule 9(g) has been adopted, providing:

(g) Referee probable cause hearing. Upon the certification of the Panel chairman and the Board chairman to the Court that extraordinary circumstances indicate that a matter is not suitable for submission to a Panel under this Rule, because of exceptional complexity or other reasons, the Court may appoint a referee with directions to conduct a probable cause hearing acting as a Panel

would under this Rule, or the Court may remand the matter to a Panel under this Rule with instructions, or the Court may direct the Director to file with this Court a petition for disciplinary action under Rule 12(a). If a referee is appointed to substitute for a Panel, the referee shall have the powers of a district court judge and Ramsey County District Court shall not exercise such powers in such case. If the referee so appointed determines there is probable cause as to any charge and a petition for disciplinary action is filed in this Court, the Court may appoint the same referee to conduct a hearing on the petition for disciplinary action under Rule 14. If a referee appointed under Rule 14 considers all of the evidence presented at the probable cause hearing, a transcript of that hearing shall be made part of the public record.

Only when the Panel and Board Chair certify to the Court that the matter is not suitable for Panel, may the Court either appoint the referee in the Panel's place, remand the matter to a Panel or direct the filing of a petition.

A somewhat similar rule, for cases with limited areas of dispute has been adopted, allowing Panels to substitute for referees, as follows:

RULE 14.

\* \* \*

(f) Panel as referee. Upon written agreement of an attorney, the Panel chairman and the Director, at any time, this Court may appoint the Panel which is to conduct or has already conducted the probable cause hearing as its referee to hear and report the evidence submitted for or against the petition for disciplinary action. Upon such appointment, the Panel shall proceed under Rule 14 as the Court's referee, except that if the Panel considers evidence already

presented at the Panel hearing, a transcript of the hearing shall be made part of the public record. The District Court of Ramsey County shall continue to have the jurisdiction over discovery and subpoenas in Rule 9(d) and (h).

**Referee disbarment recommendation and semi-automatic suspension.** It is not unusual for six months or more to elapse between the time a referee makes findings, conclusions and a recommendation for discipline, and the final decision by the Court. It seems fair to balance the interests of the public and the attorney, when the referee recommends disbarment, by providing that the attorney shall be temporarily suspended during the Court's decision-making period unless an order is made to the contrary. The new Rule 16(e) provides:

(e) Interim suspension. Upon a referee disbarment recommendation, the lawyer's authority to practice law shall be suspended pending final determination of the disciplinary proceeding, unless the referee directs otherwise or the Court orders otherwise.

**Miscellaneous.**

**Panel hearing exhibits and panel affirmance of admonitions.** Rule 9(f)(3) has been amended to require that each party provide copies of his or her own exhibits to the panel members. Rules 9(k) and (m) (formerly 9(j) and (l)), were amended to require that the Director notify the respondent of appeal rights in an admonition appeal only when the panel has affirmed the admonition.

**Additional charges.** Rule 10(e) (formerly Rule 10(d)) was amended to require the Director to present additional charges to the Board chair or vice chair where a petition under Rule 12 is pending before the Court, and the matter was not heard previously by a Panel.

**Subpoenas for referee hearings.** On several occasions questions have arisen as to jurisdiction to issue subpoenas for witnesses and documents for proceedings before a referee pursuant to Rule 14, RLPR. Rule 14 has been amended to add a subsection (c) which provides that the District Court of Ramsey County shall issue subpoenas, and the referee shall have jurisdiction to determine all motions arising from the issuance and enforcement of subpoenas.

**Costs.** Rule 24 has been amended to increase the amount of costs to the prevailing party from \$500 to \$750. This is to ensure that a greater portion of the cost of the disciplinary system should be borne by those attorneys whose conduct requires public discipline. Rule 15 has been amended to permit the Court to order a respondent attorney to pay costs for asserting bad faith or vexatious claims in lawyer discipline proceedings.

# Attorneys and Tax Obligations...

The Commissioner [of the Department of Revenue] may provide to the Minnesota Supreme Court and the Board of Professional Responsibility information regarding the amount of any uncontested, delinquent taxes due under this chapter or a failure to file a return due under this chapter by an attorney admitted to practice law in this state under Chapter 481.

This 1986 amendment to Minn. Stat. §290.61 has led the Revenue Department to send to the director's office a number of notices regarding attorneys who have not filed their state tax return or not paid uncontested tax obligations. Eighteen notices of nonfiling have been received in September and October alone.

In 1972 the Minnesota Supreme Court notified Minnesota lawyers of its intention to impose severe discipline for nonfiling of income tax returns:

... For violations occurring hereafter, the discipline will consist of either suspension or disbarment. The alternative of granting probation is still reserved by the court in the future, but it will be allowed in only the most extreme, extenuating circumstances, and absent such extreme, extenuating circumstances, the only issue for consideration upon such disciplinary proceedings will be the determination whether to disbar or suspend a lawyer who is guilty of such a violation. *In re Bunker* 199 N.W.2d 628, 632 (Minn. 1972).

Since *Bunker*, the discipline for tax violations has tended to fall into four categories:

1. Indefinite suspension, for a minimum period of one year, for repeated, serious nonfiling.<sup>1</sup>
2. Short suspension for isolated cases of nonfiling or nonfiling mitigated in some significant way.<sup>2</sup>
3. Reprimand and probation for attorneys involved in *de minimus* tax violations or violations substantially mitigated by circumstance.<sup>3</sup>
4. Disbarment for offenses including nonfiling of tax returns and other significant misconduct.<sup>4</sup>

The Revenue Department has recently become considerably more aggressive about tax enforcement for all citizens, and particularly those with

state licenses. The department has apparently referred more cases of nonfiling for criminal prosecution. Minn. Stat. §270.72, passed in 1984, provides for revocation of state licenses for those who do not pay income tax obligations. The statute has not been applied directly to attorneys, out of consideration for separation of powers and the inherent authority of the Minnesota Supreme Court to regulate attorney licensing. However, the department has begun reporting to the director's office cases of alleged flagrant nonpayment of tax obligations and persistent refusal to respond to department notices.

withholding returns and to pay amounts due. Some authorities indicate that this may be regarded as analogous to failure to file income tax returns and misappropriation of trust funds.<sup>5</sup>

Under the new reporting statute and practices of the Department of Revenue, the attorney professional responsibility system will be faced with a number of cases involving attorney noncompliance with tax laws. The question will have to be addressed whether an attorneys' egregious failure to pay income tax obligations will evoke sanctions similar to those imposed on other state licensees. An attorney's oath requires maintaining

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*"The Revenue Department has recently become considerably more aggressive about tax enforcement for all citizens, and particularly those with state licenses."*

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Lawyers have not been disciplined professionally in Minnesota solely for nonpayment of tax obligations or other debts. If an attorney, without bad faith or ignoring judgment, is simply unable to pay debts incurred, discipline would not be appropriate. Bankruptcy protection is available to attorneys as well as other debtors. However, at least in a bar admission matter, the Court has indicated that the willful avoidance of unlawful debt obligations is inconsistent with being a licensed Minnesota attorney:

He was reasonably able to satisfy his legal and moral obligations to prepare for repayment and continue repayment of his student loans. His failure to do so demonstrates lack of good moral character and reflects adversely on his ability to perform the duties of a lawyer. *Application of Gahan*, 279 N.W.2d 826, 831-2 (Minn. 1979).

The Revenue Department has also begun to report to the director's office the failure of attorneys to file employee

respect for laws, including the state's income tax laws. For 15 years attorneys have been on notice that the Court takes its licensed attorneys' tax-filing obligations as a serious matter. The new reporting statute and this article are further notice that failure to meet such obligations may well result in Supreme Court discipline.

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1 *In re Sax*, 321 N.W.2d 902 (Minn. 1982); *In re Lee*, 334 N.W.2d 163 (Minn. 1983).

2 *In re Fitzgerald*, 366 N.W.2d 262 (Minn. 1985); *In re Southwell*, 373 N.W.2d 592.

3 *In re McCallum*, 289 N.W.2d 146 (Minn. 1980); *In re Kerr*, 287 N.W.2d 652 (Minn. 1979); *In re Anastas*, 368 N.W.2d 271 (Minn. 1985); *In re Piper*, 387 N.W.2d 882 (Minn. 1986).

4 *In re Serstock*, 316 N.W.2d 559 (Minn. 1982); *In re Larson*, 324 N.W.2d 656 (Minn. 1982); *In re Wackerbarth*, 287 N.W.2d 651 (Minn. 1979).

5 See *Grievance Administration v. Nickels*, 373 N.W.2d 528 (Mich. 1985) and *People v. Fenton*, 437 P.2d 35 (Colo. 1968).



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Lawyer's Prof. Resp. Board  
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DEC Investigation (BMS)

DISTRICT 8

<u>Case Number/Title/</u>	<u>Date</u> <u>Opened</u>	<u>Date</u> <u>Report Due</u>	<u>Status</u>
96-L2-87-000295	03/31/87	05/29/87	1 Asgn DEC
vs.			

\*\*\* Total DEC Investigation Cases = 3

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	(PDN)		DISTRICT 11
96-LX-86-000955	10/09/86	05/15/87	9 DEC Ext
vs.			
96-L8-87-000026	01/12/87	03/29/87	4 DEC 2 Is
vs.			
96-L3-87-000094	01/28/87	04/05/87	3 DEC 1 Is
vs.			
96-L5-87-000131	02/12/87	04/09/87	3 DEC 1 Is
vs.			
96-L2-87-000183	02/25/87	04/19/87	3 DEC 1 Is
vs.			
96-L6-87-000235	03/12/87	05/07/87	3 DEC 1 Is
vs.			

\*\*\* Total DEC Investigation Cases = 6

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	(BMS)		DISTRICT 10
96-L0-87-000148	12/19/87	04/16/87	3 DEC 1 Is
vs.			

\*\*\* Total DEC Investigation Cases = 1

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DEC Investigation (PDN)

DISTRICT 14

<u>Case Number/Title/</u>	<u>Date Opened</u>	<u>Date Report Due</u>	<u>Status</u>
96-L8-87-000205 vs.	03/06/87	04/27/87	3 DEC 1 Is
96-L4-87-000248 vs.	03/17/87	05/08/87	3 DEC 1 Is
96-LX-87-000349 vs.	04/16/87	06/07/87	1 Asgn DEC

\*\*\* Total DEC Investigation Cases = 3

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	(PDN)	DISTRICT 14
96-L1-86-001122 vs.	11/26/86	70 Sts Req
96-L4-87-000055 vs.	01/20/87	4 DEC 2 Is
96-LX-87-000304 vs.	04/02/87	1 Asgn DEC

\*\*\* Total DEC Investigation Cases = 3

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	(KLJ)	DISTRICT 14
96-L4-87-000377 vs.	04/27/87	1 Asgn DEC

\*\*\* Total DEC Investigation Cases = 1

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Report No: TP2357  
Program #: TAR277  
Date/Time: 050187/2017

Lawyer's Pr. Resp. Board  
Attorney Case List  
as of April, 1987

Page 1

COLE

Admonition Review

Date Opened	Respondent/Complainant	Case Number	Date Assigned	Code	Remarks
01/02/87		L5-87-000002	01/02/87	13 Adm Isd	neglect-AD issued
11/19/86		L2-86-001100	02/25/87	13 Adm Isd	AD-4/17;neglect;supervision
03/17/86		L6-86-000256	03/17/86	12 Adm Drf	CMH drafting admonition
01/02/87		L7-87-000003	01/02/87	13 Adm Isd	neglect-AD issued
02/19/87		L2-87-000149	02/19/87	13 Adm Isd	Mtg. w/R-5/30/87? AD issued
12/08/86		L2-86-001145	03/25/87	13 Adm Isd	neglect; ADM issued 4/14
09/17/86		L1-86-000861	01/28/87	13 Adm Isd	Neglect;AD issued 4/17

Report No: TP2357  
Program #: TAR277  
Date/Time: 050187/2017

Lawyer's Prc Resp. Board  
Attorney Case List  
as of April, 1987

COLE

LPRB Investigation

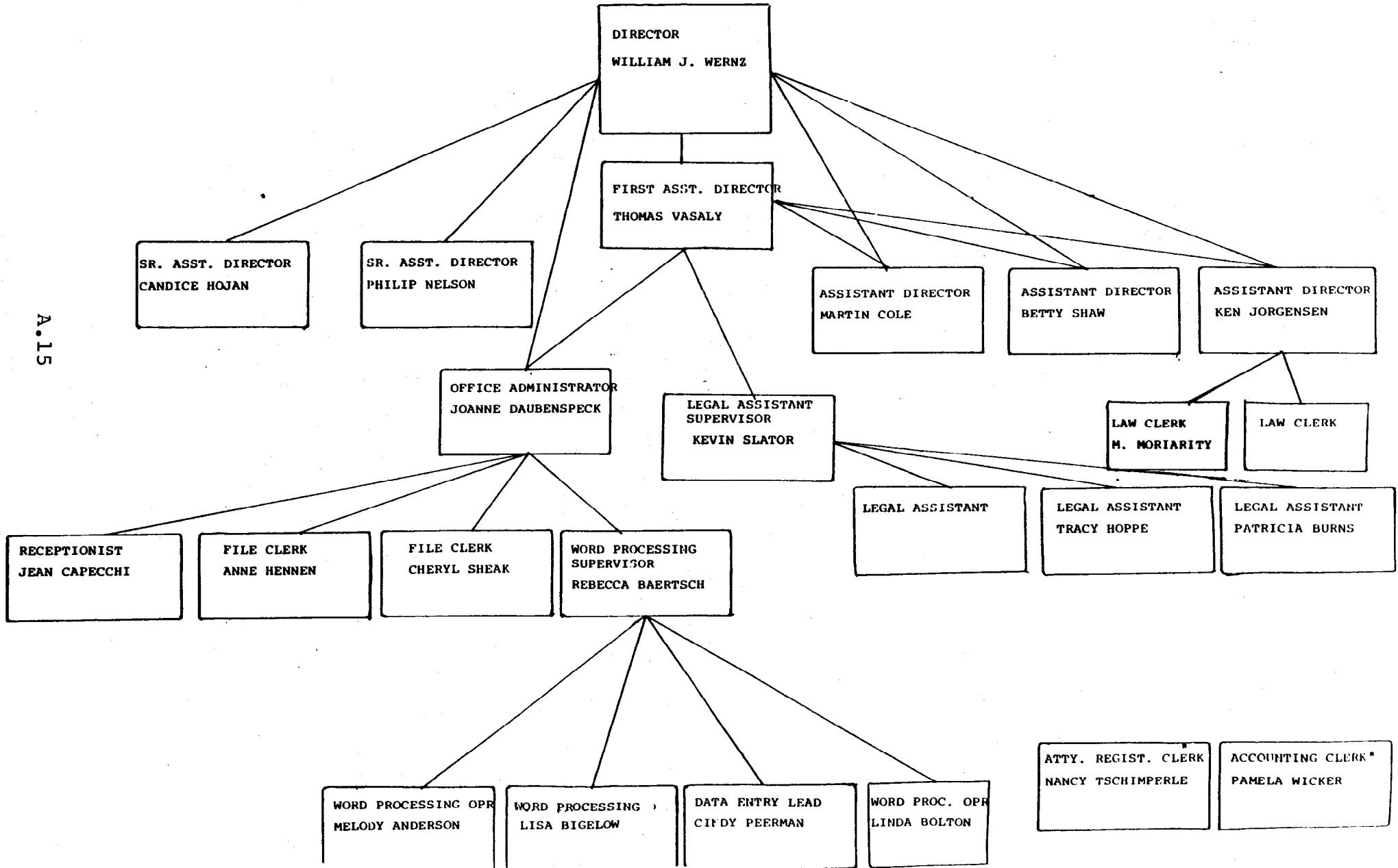
<u>Date</u> <u>Opened</u>	<u>Respondent/Complainant</u>	<u>Case Number</u>	<u>Date</u> <u>Assigned</u>	<u>Code</u>	<u>Remarks</u>
04/29/87		L9-87-000388	04/29/87	11 Asg Off	
11/25/86		L4-86-001115	11/25/86	19 PDA Drf	T/A; failure to account
02/04/87		L1-87-000109	02/04/87	19 PDA Drf	failure to account
06/18/85		L4-85-000598	03/27/87	16 Chrgs D	Tax non-filing
07/08/85		L8-85-000667	03/27/87	16 Chrgs D	ticket-fixing
04/14/87		L8-87-000334	04/14/87	11 Asg Off	neglect, response due 5/5
10/31/86		L1-86-001038	02/11/87	81 DNW Drf	failure to account
12/17/86		L8-86-001182	12/17/86	16 Chrgs D	Failure to account

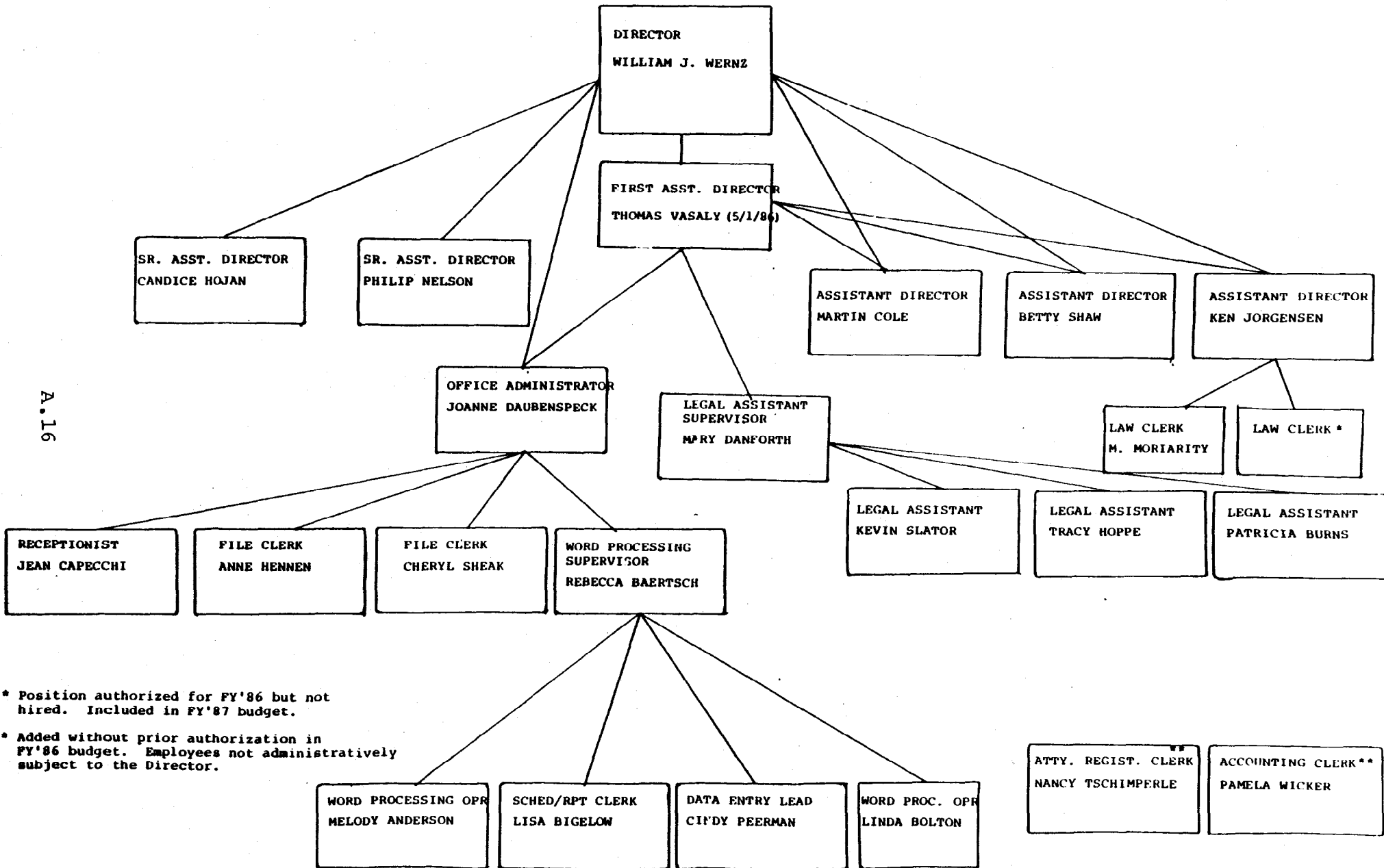
OFFICE OF THE DIRECTOR OF LAWYERS PROFESSIONAL RESPONSIBILITY

5/87

Employees not administratively  
subject to the Director

A.15





A.16

\* Position authorized for FY'86 but not hired. Included in FY'87 budget.

\*\* Added without prior authorization in FY'86 budget. Employees not administratively subject to the Director.

FY'87

SPEAKING ENGAGEMENTS

<u>DATE</u>	<u>ATTORNEY</u>	<u>COURSE TITLE</u>
8/7/86	WJW	NOBC Conference
8/24/86	WJW	CLE: Public Defender
8/25/86	WJW	CLE: Criminal Justice Institute
9/9/86	CMH	Ramsey County Bar Association - Corp. & Banking Law Section
9/11/86	WJW	CLE: 4th DEC orientation
9/12/86	WJW	1986 MSBA Leadership Workshop
9/26/86	WJW, CMH, KLJ, etc.	DEC Seminar
10/22/86	WJW	Washington County Bar
11/4/86	WJW	CLE: Prof. Resp. System - U of M
11/14/86	WJW	MILE: Legal Malpractice & Attorney Discipline: Law & Procedure
11/21/86	WJW & KLJ	MILE: Litigation & Ethical Issues
12/9/86	KLJ	CLE: Bridge-The-Gap
1/9/87	CMH	Professional Responsibility for Family Law Lawyers
1/23/87	WJW	12th District Bar Association Mtg. -
2/19/87	WJW	Practical Probate Seminar
3/14/87	BMS	Media and the Courts
3/20/87	KLJ	Professional Responsibility: Minnesota Women Lawyers
3/25/87	CMH	Small Law Office Management
4/9/87	WJW	Hennepin County Attorney's Office
4/22/87	WJW	Crime Seminar
5/28/87	WJW	Speak to Attorney General's office

# Office of Lawyers Professional Responsibility

## Complaint and Investigation Procedures



Office of Lawyers Professional Responsibility  
520 Lafayette Road, First Floor  
St. Paul, MN 55155 (612) 296-3952

### THE MINNESOTA LAWYER PROFESSIONAL RESPONSIBILITY SYSTEM

This brochure explains the procedures that are followed in filing and handling ethics complaints against Minnesota lawyers. It is designed to help understand the Minnesota lawyer disciplinary system and the roles of the Minnesota Supreme Court, Lawyers Professional Responsibility Board, Director of the Office of Lawyers Professional Responsibility and district ethics committees in the system. It is also intended to inform the public and lawyers of the procedures, rules, and regulations which govern the Minnesota disciplinary agency in the investigation of complaints against Minnesota lawyers.

#### I. Who Can Be Investigated?

The Director's staff and the district ethics committees investigate complaints against individual lawyers licensed to practice law in the State of Minnesota. Complaints against entire law firms are not normally investigated as such. Complaints against judges are handled by a separate agency, the Board on Judicial Standards.

#### II. What Will or Will Not be Investigated.

Complaints that lawyers have acted unprofessionally are investigated. "Unprofessional" is specified by the Minnesota Rules of Professional Conduct. Examples of unprofessional conduct claims which are investigated include:

- (1) neglect of a legal matter;
- (2) failure to communicate adequately;
- (3) conflict of interest;
- (4) misrepresentations;
- (5) mishandling funds.

There are some kinds of complaints which will not be investigated. For example, when (1) the subject of the complaint is not a Minnesota lawyer; or (2) the allegations of the complaint do not amount to unprofessional conduct as defined by the Rules of Professional Conduct—for example, a claim of bad manners; or (3) there is another forum or court which can best consider the claim—for example, an appeals court reviewing a criminal conviction or a civil court for a malpractice claim. Certain kinds of fee disputes are usually not investigated.

#### III. Complaints Concerning Legal Fees.

The Director's Office receives many com-

plaints involving legal fees. Except in extraordinary cases, when a lawyer has charged an obviously illegal or grossly excessive fee, the Director's Office does not investigate fee disputes. This office does not try to help people have legal fees reduced. The Minnesota State Bar Association has established fee arbitration committees around the state to help resolve disputes between lawyers and clients concerning legal fees. Fee arbitration procedures are often quicker, cheaper, and less formal than court proceedings. The cases are usually heard by a panel consisting of one lawyer and two non-lawyers. Not every fee dispute can be submitted to the fee arbitration boards. To determine whether a case can be submitted to fee arbitration, and for further information contact the Minnesota State Bar Association, 430 Marquette Avenue, Suite 403, Minneapolis, MN 55401 (612) 333-1183. Fee disputes are also handled in probate court for estates and in bankruptcy court for bankruptcy matters.

#### IV. Organization: District Ethics Committees, Director, Lawyers Board and the Supreme Court.

**District Ethics Committees.** District ethics committees investigate most ethics complaints initially, and submit a report and recommendations to the Director for a decision. District ethics committee members are volunteer lawyers and public members throughout the state.

**Director.** The Director of the Office of Lawyers Professional Responsibility is responsible for investigating and processing all complaints of unprofessional conduct against Minnesota lawyers. The Director and his staff work full-time to investigate and process complaints. The salaries and expenses of the Director's office are paid entirely by Minnesota lawyers through their annual attorney registration fee.

**Lawyers Board.** The Minnesota Lawyers Professional Responsibility Board (Board) consists of a chairman and 22 members. The chairman and 13 members are lawyers. The other nine members, called public members, are not lawyers. Members of the Board are appointed by the Minnesota Supreme Court for terms of up to three years. Board members are volunteers who come from communities around the State of

Minnesota and work in the professional responsibility system as a service to the public. An Executive Committee of the Board provides general supervision for the system. Other Board members divide into panels and conduct preliminary hearings on charges against lawyers. Board members also review appeals by complainants. The Board's goal is to maintain the honor and high standards of the legal profession.

**Supreme Court.** The Minnesota Supreme Court is responsible for the rules creating and governing the lawyer professional responsibility system. The Court makes the final decision in all public discipline cases. The Court also appoints the Lawyers Professional Responsibility Board members and the Director of the Office of Lawyers Professional Responsibility.

#### V. Rules

The Rules on Lawyers Professional Responsibility (Rules) set out the procedures for investigating complaints of alleged lawyer unprofessional conduct or disability. In addition to these procedural rules, there are the Rules of Professional Conduct which establish the standards of conduct for Minnesota attorneys. The Rules of Professional Conduct do not attempt to define all the ethical standards which should guide lawyers, but only those fundamental norms which must be observed. Both sets of Rules can be found in law libraries and public libraries in the Minnesota Rules of Court and in Minnesota Statutes, Court Rules.

#### VI. Complaint Procedures.

To file a complaint a person can either call the Director's Office, and a complaint form will be sent, or write a letter. The letter must include the writer's name and address, the lawyer's name and address, and a statement of the facts setting out what is alleged to be unethical conduct. Copies of any important documents or letters should be sent with the letter of complaint to:

Office of Lawyers Professional  
Responsibility  
520 Lafayette Road, First Floor  
St. Paul, MN 55155

Within about a week after a complaint is received, the Director's Office will send a notice to the complainant and the respondent attorney.



acknowledging receipt of the complaint and sending the attorney a copy. The notice will also state whether there will be an investigation. If there is an investigation, the investigator will be named in the notice, and the attorney's reply will be requested.

Often times, a person may not know exactly what information to include in the complaint. For this reason, after reviewing the complaint, one of the Director's assistants or a district ethics committee member may send a letter asking for additional information. Cooperation in providing requested information and/or materials is necessary.

If a complaint requires investigation, it will be investigated by a volunteer investigator for one of the district ethics committees around the state or by the Director's Office. Most complaints are investigated by the local district committees. If a committee investigates, both the complainant and the respondent attorney should communicate and cooperate with the committee. Rule 25 requires lawyers to cooperate with the investigation. Under the Rules, the committee will make a report and recommendation to the Director concerning the complaint. The Director will review the matter and conduct any necessary further investigation. Investigations, whether by the district committees or the Director's Office, include reviewing papers or court records, speaking to witnesses, and speaking further, if necessary, to the complainant and/or the lawyer. District Committee investigations normally take about 45 days, but sometimes several months are needed.

#### VII. Final Decision.

When the investigation or consideration is completed, the complaint will be resolved in one of four ways:

(1) The complaint may be dismissed. This may mean there was not clear and convincing evidence of misconduct, or, that what the lawyer did was not unprofessional; or, that the complaint was not the kind the Director's Office investigates—such as an ordinary fee dispute.

(2) The Director may issue an "admonition." This is a permanent record stating that the lawyer's conduct was improper and warn-

ing the lawyer not to repeat the conduct. An admonition is used where the lawyer's conduct was unprofessional, but isolated and relatively non-serious. The Director will send copies of the admonition to the parties but admonitions are otherwise private.

(3) The Director and the lawyer may enter into a private "stipulated probation." A probation means that the Director and lawyer agree that for a specified period of time the lawyer must comply with certain conditions, sometimes including supervision. Private stipulated probation is appropriate where the lawyer's misconduct is more than isolated and non-serious but is not serious enough to warrant public discipline. Examples would include a lawyer who has neglected several files or who has a personal health problem that caused his misconduct.

(4) In the most serious cases of unprofessional conduct, the Director may present the complaint to a Panel of the Lawyers Professional Responsibility Board. Only about one complaint out of twenty has been found serious enough to present to a Board Panel. The Panel will determine whether public discipline is probably appropriate. If not, the Panel will dismiss the complaint. If the Panel does find probable cause that public discipline is warranted, it will instruct the Director to file a petition for disciplinary action against the lawyer in the Minnesota Supreme Court.

If a public petition is directed, the case will usually be heard by a referee appointed by the Supreme Court. The Supreme Court ultimately decides what discipline, if any, is appropriate.

The Court may:

(1) Disbar the lawyer;

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

(3) Order the lawyer to pay a fine, costs, or both;

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

(5) Reprimand the lawyer;

(6) Order the lawyer to take an ethics examination;

(7) Make such other dispositions as the court deems appropriate; or

(8) Dismiss the petition for disciplinary action.

All parties are notified in writing of the final decision.

#### VIII. Appeal Rights.

Any decision except the Supreme Court's can be appealed. The complainant may appeal a dismissal of complaint, admonition or private probation within fourteen days of the decision by notifying the Director in writing. The appeal will be considered by a Lawyers Board member, who can (1) approve the Director's decision, or (2) direct the matter to a Panel for a probable cause review, or (3) direct further investigation. On any matter submitted to a Panel, in which the complainant is dissatisfied with the result, a petition for review may be filed with the Supreme Court within two weeks.

A lawyer may demand a Panel hearing if an admonition is issued. If the Panel affirms the admonition, the lawyer may appeal to the Supreme Court.

#### IX. What The Director's Office Does.

It is the Director's function and duty to enforce the Minnesota Rules of Professional Conduct which are the standard of conduct for attorneys. If the Director determines that a lawyer violated the Rules, appropriate action will be taken as described above. That action is not to benefit any individual, but to instruct or discipline the lawyer and to protect the public.

#### X. What the Director's Office Cannot Do.

A. The Director's Office cannot represent people in any legal matter or give legal advice. Complainants must retain their own lawyer if they need either legal advice or representation.

B. The Director's Office cannot take money or property from a lawyer to return to a client or creditor.

C. The Director's Office cannot sue a lawyer for careless work, nor can the Director's Office do work a lawyer failed to do.

D. The Director's Office cannot change the

fee a lawyer charged or require a refund, even if the fee is clearly excessive.

The Director's Office is limited to investigating complaints of unethical conduct and prosecuting disciplinary actions against lawyers.

#### XI. Client Security Fund.

The Minnesota Supreme Court has established a Client Security Fund to pay genuine claims against attorneys who have intentionally defrauded clients. Further information can be obtained from the Fund administrator, whose name and address can be obtained from the Director's Office.

#### XII. Answers to Frequently Asked Questions.

Q. Is there a charge for investigation of a complaint?

A. There is never a charge for filing a complaint or for investigation. The Director's office is funded by attorney registration fees.

Q. Can I get into trouble for complaining against a lawyer?

A. Rule 21 states that a statement or complaint against a lawyer in connection with the Director's investigation, "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."

Q. Are complaints against lawyers public?

A. The general rule is that complaints against lawyers are not public. The investigation files are not available to anyone except the lawyer. Parts of the file may be disclosed only when necessary for investigation. One exception to this rule is the Supreme Court filings and hearings, including trials before Supreme Court referees, are open to the public.

#### XIII. Conclusion.

The Minnesota lawyer discipline system is a service to the public and the legal profession, to review complaints that lawyers have acted unethically. It is meant to be fair to complainants and lawyers, so that claims are promptly and reasonably considered.

Further questions about lawyers professional responsibility can be asked by calling (612) 296-3952.

# Probation as a Disciplinary Disposition . . .

An effective lawyers professional responsibility system must try to be many things to many people. The primary function of any lawyer disciplinary system is to protect the public, the bench, and the bar from lawyers who are untrustworthy, incompetent, disabled, or otherwise unfit. The director's office spends a high percentage of its time and resources investigating and presenting public disciplinary cases in which risk to the public exists and notice to the public of an attorney's misconduct is essential.

A second important function is educational. Through advisory opinions, seminars, articles, and participation in rules-making, the people involved in professional responsibility work try to share with the bench and bar their knowledge and reflections on attorney ethics. As in many areas of law, there are growing bodies of literature, rules and cases, and a corresponding need for expertise.

A third function, perhaps less well known, is to help lawyers who have violated the disciplinary rules, but whose conduct likely can be corrected so that they can continue to serve the public. The Court and the Director's Office take this function seriously, although they cannot allow it to override their primary duty of protecting the public. As a result, Minnesota is a national leader in the effective use of probation as a disciplinary disposition.<sup>1</sup>

Minnesota has two types of probation. The first type is imposed directly by the Minnesota Supreme Court under Rule 15(a)(4), Rules on Lawyers Professional Responsibility (RLPR), and through its inherent power to regulate the bar. The Court may place an attorney on probationary status for a period of time or until further order of the Court. Such public probations may be ordered in conjunction with other discipline or after reinstatement from a period of suspension.

The second type of probation is a private, stipulated probation which is entered into by the director and an

<sup>1</sup> *Admonitions, issued for 'isolated and non-serious' rule violations, serve all three functions identified above.*

attorney, subject to approval by the chairperson of the Lawyers Professional Responsibility Board. Rule 8(c)(3), RLPB. Such a probation is used in lieu of the director filing charges of unprofessional conduct against an attorney and seeking public discipline. If the director and the respondent stipulate, then the respondent is placed on probation for a specified period of time, generally two years. If the respondent complies with the conditions set forth in the stipulation, the matter is then closed after the probationary period. A private, permanent record is maintained.

In 1986, 90 attorneys were on probation during some portion of the year. The Minnesota Supreme Court ordered 34 probations, while the remaining 56 probations were stipulated to by the director and the attorney.

Common examples of situations leading to probation include:

1. Supreme Court ordered probation for several years, following suspension, for failure to file income tax returns.
2. Private probation for a chemically dependent attorney who has neglected a couple of files but is recovering from the dependency.
3. Inadequate books and records, without shortages of client funds, may result in a supervised probation with periodic review of books and records.
4. Multiple instances of neglect or noncommunication without serious client prejudice.

Many probations are supervised by volunteer attorneys. These attorneys are usually nominated by the probationer, and approved by the Director's Office. As with the district ethics committees, the viability of the probation alternative depends a great deal on the efforts of volunteers.

Supervision of a probationer is not conducted on an intense day-to-day basis. The supervisor usually meets with the attorney at least quarterly regarding the attorney's practice and compliance with the terms of the probation. Supervisors also may be requested to review an attorney's books and records to assure compliance with the rules or monitor the attorney's

abstinence from alcohol or attendance at AA meetings.

The requirements for successful completion of probation vary. Requirements may include establishing and maintaining proper books and records or office procedures, achieving a passing score on the professional responsibility exam, restitution to clients, the continuance of psychological treatment, or completion of a legal matter previously commenced. All attorneys placed on probation are, of course, required to cooperate with the Director's Office in the investigation of any further complaints of unprofessional conduct and abide by the Rules of Professional Conduct.

As might be expected, the success record for probations has been mixed. Unfortunately, about one-third of all private probationers have ended up with public discipline, either after probation revocation, or some time after "successfully" completing probation. Some of the factors which seem to indicate that the attorney is a poor candidate for probation include failure to communicate, dishonesty, or unwillingness to admit that a problem exists.

There are successes to report. A number of attorneys with chemical dependency or psychological problems have avoided public discipline and further problems in their practice by stipulating to probations including treatment plans. Others, benefiting from an experienced supervisor, have initiated office procedures which have resolved problems of neglect and noncommunication.

Balancing the duty to protect the public with a natural inclination to try to help an attorney with a problem is a delicate matter. When there has been dishonesty, client harm, repeated noncooperation or some other serious misconduct, probation may be unworkable. There is room for compassion in working with an attorney whose misconduct is limited and who is willing to solve his or her problem. Being soft-hearted, however, cannot replace being hard-headed when serious misconduct indicates a danger to the public or a threat to the standards of the bench and bar. ■