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June 26, 1990

Fred K. Grittner
Clerk of Appellate Courts
230 State Capitol
St. Paul, MN 55155

Re: Annual Report

Dear Mr. Grittner:

Enclosed for filing is the joint Annual Report of the Director of Lawyers Professional Responsibility and the Lawyers Professional Responsibility Board.

The justices received copies of the report prior to the Board's approval. The Board approved the report, as submitted, on June 15, 1990.

Very truly yours,



William J. Wernz
Director

jd
Enclosure
cc: Glenn E. Kelley (no enclosure)

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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 June 1, 1989, through May 31, 1990.

Highlighting this year's report is the increase in complaints against Minnesota lawyers, including numerous complaints of serious misconduct.

- . **Increase in Complaints.** In 1989 complaints increased 18 percent, from 1,149 to 1,365. The first five months of 1990 reflect a further increase, annualized to approximately 1,500 complaints. While last year's report featured the educational efforts the professional responsibility system was able to undertake, this year's report is largely the story of coping with the upsurge in complaints. As data and graphs presented below indicate, the increase in complaints would be more worrisome if it had not been preceded by several years of decline or small increases in complaints. The long term picture is

one of close correlation between number of licensed Minnesota attorneys and number of complaints. Thus, the ratio of complaints to licensed Minnesota attorneys in 1989 was the same as that in 1979, .07.

The FY91 budget includes an additional Assistant Director position, to help deal with the mounting caseload. The number of full-time employees in the Director's Office has not increased since 1985.

- **Misappropriation Cases.** Perhaps more worrisome than the increased volume of complaints is the serious misconduct coming to light. In recent years the Court has issued about 40 discipline and reinstatement opinions annually. In the first five months of 1990 there have been 30 such opinions. The most serious misconduct, misappropriation of trust funds, has become the most troublesome development of all: James O'Hagan's taking of approximately \$3 million and Thomas Bartsh's taking of approximately \$750,000, far exceed even the notorious misdeeds of Flanagan, Sampson, Batdorf, Benson and Danna in recent years. Through creation of the Client Security Board, adoption of a trust account overdraft notice program and dissemination of a booklet explaining proper trust account procedures, much has been done to strengthen systems for dealing with trust account problems. Other programs, particularly a random trust account audit program, have been considered. The phenomenon of regular large-scale trust fund thefts is

recent and profoundly unsettling. Swift disbarment and criminal proceedings have followed the discovery of each theft and almost all clients suffering losses have been fully compensated. However, questions remain of whether further preventative or disciplinary measures could be taken and of the image of the bar both to the public and to itself.

. **Reviews of the Professional Responsibility System.**

Over five years have now passed since the initial report of the Supreme Court Advisory Committee, chaired by Nancy Dreher, recommended numerous changes in Lawyers Board procedures. The Board will soon be considering recommendations for further change in procedures.

The Rules of Professional Conduct, adopted in 1985, have been subject to only a few amendments, most recently in January 1990. The most important of these (1) proscribe harassment by attorneys and (2) establish a program for notice of trust account overdrafts. The Minnesota State Bar Association has appointed a standing committee, chaired by Minneapolis lawyer Walt Bachman, that will be considering further proposals for recommending change to the Court.

Overarching both of these reviews is a national review by the ABA Commission on Evaluation of Disciplinary Enforcement. This Commission, chaired by New York lawyer Robert McKay, will make its report in August 1991. It is expected to be extremely influential. Minnesota will

have special opportunities to contribute to the McKay Commission report both through the appearances of two Board members before the McKay Commission public hearings and also by Robert McKay's appearance at the annual Professional Responsibility Seminar on October 19, 1990.

- . **Supreme Court Cases.** Notwithstanding the increasing volume of cases, matters before the Supreme Court have actually been handled more promptly than in the past. During the years 1988-89 the average Supreme Court disciplinary case was resolved in a little more than half the time required in 1985-86. See Table IV below.

II. CASE LOAD AND CASES.

A. Statistics.

The large increase in the numbers of complaints received in 1989 and in 1990 to date are reflected in three important categories: the number of open files, which increased from 358 in December 1988 to 495 in 1989 (Table II); the average length of investigation by the volunteer district ethics committees, which has increased from 1.4 months in April 1989 to 2.2 months in April 1990; and in the number of Supreme Court dispositions in 1990 to date which is about twice the comparable figures for recent years.

The system has continued to prevent large numbers of files from reaching the year-old mark. The current number is comparable to those of the last several years (Table II). As of May 31 there was only one file more than two years old; it is

connected with lengthy civil litigation. The most serious cases--those resulting in Supreme Court opinions--have continued to be handled promptly. Indeed Supreme Court discipline cases were completed nearly twice as fast in 1988-89 as they were in 1985-86. See Table IV. However, the large overall number of files on hand may be expected to result in a growing number of older files--at least until additional staff can increase the number of file closings.

The district committees have borne the brunt of the increase in complaints. The 194 files in the district committee appears to be the largest number ever before the committees. The average age of investigation in the district committee in April 1990 was 2.2 months, compared to 1.3 and 1.4 months in April of 1988 and 1989, respectively. Hennepin County particularly was inundated with investigative responsibilities, having over 100 files on hand in April 1990. The committee found it necessary to have special meetings and additional investigators to deal with a rising backlog, and an unfortunate increase in the number of extremely old investigative files. Twenty-two of the 23 oldest district committee files in Minnesota were in Hennepin County as of April 30. However, the Committee's special efforts in the last few months are expected to result in improvement in this troublesome area. Attached at A. 1 is the most recent district committee summary and aging analysis report.

Table I
 Supreme Court Dispositions 1976-1989
 Number of Lawyers

	Disbar.	Susp.	Prob.	Censure & Rep.	Dismiss.	Other	Total
1976	4	5	0	0	0	1	10
1977	1	2	0	1	0	0	4
1978	6	10	3	4	0	0	23
1979	6	4	2	3	0	0	15
1980	1	3	1	1	0	0	6
1981	3	4	1	1	1	0	10
1982	6	8	0	5	2	2	23
1983	4	4	0	3	2	1	14
1984	3	7	3	9	0	1	23
1985	4	15	13	10	3	1	46
1986	8	17	4	2	0	0	31
1987	5	18	7	4	0	0	34
1988	4	22	8	4	1	0	39
1989	5	19	8	4	2	0	38

Table II

	<u>12/86</u>	<u>12/87</u>	<u>12/88</u>	<u>12/89</u>	<u>5/31/90</u>
Total Open Files	406	389	358	495	488
Cases at Least One Year Old	52	54	39	43	44
Complaints Received Y.T.D.	1,233	1,091	1,149	1,365	620
Files Closed Y.T.D.	1,244	1,122	1,180	1,228	627

Table III

	Percentage of Files Closed				
	1985	1986	1987	1988	1989
1. Total Dismissals	82%	82%	79%	81%	79%
a. Summary Dismissals	30%	34%	36%	41%	38%
b. DNW/DEC	36%	39%	34%	32%	35%
c. DNW/DIR	17%	9%	9%	8%	6%
2. Admonitions	7%	8%	9%	9%	10%
3. Private Probation	4%	1%	2%	2%	1%
4. Supreme Court Dispositions	6%	8%	9%	7%	8%
a. S. Court Dismissal	--	--	--	1%	--
b. S. Court Reprimand	1%	--	1%	--	--
c. S. Court Probation	1%	--	1%	1%	1%
d. S. Court Suspension	3%	3%	3%	4%	5%
e. S. Court Disbarment	1%	5%	4%	1%	2%

Table IV

Number of Months File Was Open at Disposition

	1985	1986	1987	1988	1989
Discipline Not Warranted/District Ethics Committee	6	4	4	4	4
Discipline Not Warranted/Director	13	6	6	6	4
Admonition	12	8	8	9	8
Private Probation	19	13	8	10	13
Sup. Ct. Reprimand	30	24	25	20	16
Sup. Ct. Probation	13	42	22	11	13
Sup. Ct. Suspension	30	27	25	16	11
Sup. Ct. Disbarment	11	13	12	9	9

B. Minnesota Supreme Court Disciplinary Cases.

About forty attorney disciplinary and reinstatement orders are issued each year by the Minnesota Supreme Court. While the subjects of these cases tend to be repetitive, each year brings a few noteworthy cases and new developments, or at least emphases.

The disbarment of James O'Hagan, for misappropriating approximately \$3 million, was the most noted Minnesota case in recent years. O'Hagan's stature in the legal community, the prominence of his law firm (Dorsey & Whitney) and clients (particularly the Mayo Clinic), combined with the sheer size of his takings, produced considerable notoriety. O'Hagan did not

contest disciplinary allegations that he had wrongly taken client funds. He was swiftly disbarred. Fortunately, restitution was made and no client suffered permanent loss, nor did the Client Security Fund receive any claims. O'Hagan still faces criminal charges and allegations of securities violations.

The prompt disbarment of Thomas Bartsh occurred only a few months after O'Hagan's disbarment. Bartsh misappropriated approximately \$750,000 of receivership funds in the Flight Transportation Company matter. The FTC matter itself involved extensive litigation, and criminal proceedings, arising out of fraudulent representations to investors. Bartsh was appointed receiver in federal district court, but the investors found themselves again victimized when he took some of the funds held for them. It may be that the investors ultimately will find protection through a large fidelity bond or other resources.

O'Hagan was also one of several cases that reminded attorneys of their responsibilities for each other. Cases in other jurisdictions have shown dramatically the financial and professional liability one attorney may have for another's misconduct.¹

Dishonesty figured prominently in many of the cases resulting in suspensions and disbarments. The "dishonest procrastinator" emerged in a disturbing number of cases. The attorney who is dilatory is a familiar figure in minor discipline

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In re Himmel, 533 N.E.2d 790 (Ill. 1988), in which Himmel was suspended for conduct including agreeing not to report theft by the client's previous attorney.

cases, but this year all-too-many attorneys were found to have tried to conceal their neglect with various, sometimes fantastic lies. In one instance a successful attorney with a good firm unsuccessfully attempted a foray into a new area of law; when he was unable to achieve good results in several cases, he told the remainder of the clients, as well as his partners, various lies about progress on their cases.²

Deceit in court proceedings also produced several public disciplines. One attorney attempted to obtain a default dissolution decree by concealing the proceedings from the other party's counsel; another falsely told his adversary that there were no more medical records to be produced. Another attorney did not witness a client's will properly, then filed false statements in probate court and gave false testimony at deposition in an effort to conceal the facts.³

Obduracy and arrogance combined to increase disciplinary consequences for several attorneys. Having missed a court appearance and bounced a check to pay the related sanction, Wayne Pokorny demanded apology from the attorney who received the bad check and filed an ethics complaint against Pokorny.⁴ On

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In re Schutter, 448 N.W.2d 517 (Minn. 1989).

3/

In re Porter, 449 N.W.2d 713 (Minn. 1990).

4/

In re Pokorny, 453 N.W.2d 345 (Minn. 1990).

another count, Pokorny insisted in oral argument before the Supreme Court that another attorney was to be faulted, for having scheduled a motion hearing the day before a holiday, rather than Pokorny being at fault for declining to attend. Another attorney faced with sanctions, and representing himself, wrote directly to a represented adverse party, threatening a RICO action, demanding dismissal of the judgment and advising the parties not to contact their own attorney. When he appealed private discipline in the matter, a Lawyers Board Panel concluded that public discipline was appropriate.

Failure to file income tax returns timely has accounted for a significant number of Minnesota attorney discipline cases in the last several years. The last of this group proved to be compendious.⁵ The court reviewed its pronouncement of over fifteen years ago that attorneys who did not file tax returns timely would be suspended or disbarred, absent "the most extreme, extenuating circumstances." Over the years many attorneys were suspended, often for brief periods, but none were disbarred for tax offenses alone. On the other hand, several tax violators were not suspended, even though their extenuating circumstances were hardly extreme. The court reviewed and summarized the standards from the tax cases. It noted that the attorneys who were not suspended had either extreme extenuating circumstances to account for their misconduct, or the tax violations themselves tended to be minimal. Thus an attorney who filed late returns,

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In re Wylde, File No. C8-88-782 (Minn. April 20, 1990).

but filed them well before any discipline investigation commenced, and whose returns showed little or no tax owing, might not be suspended even though the mitigating circumstances were not genuinely "extreme."

An important question of rule interpretation and First Amendment law arose in a case resulting in the suspension of John Remington Graham. Graham accused two attorneys and a state court judge of conspiring with a federal magistrate to fix a case in which Graham represented a party. Graham inflated a scrap of cocktail party conversation about the case being "in the bag" or words to that effect into detailed allegations of conspiracy. Graham lodged his charges in several forums, including in an affidavit in federal court, alleging the conspiracy to be "of his own certain knowledge."

After an exhaustive investigation showed that no conspiracy had occurred, Graham remained adamant. The Supreme Court appointed a referee who found that Graham's claims were frivolous and without basis. Graham was found to have violated several rules of professional conduct, including 8.2(a), forbidding a lawyer to impugn a judge's integrity "with reckless disregard" as to the truth of the allegation. Graham argued unsuccessfully that the "reckless disregard" test was entirely subjective; the Court found that the test should be objective, because in discipline proceedings, the primary concern is attorney fitness, rather than the reputational interests which are focal in defamation law. The Court was careful not to discourage appropriate complaints of judicial misconduct; if Graham had

reported what he knew, together with his inferences, suppositions and speculations, identified as such, he would not have been disciplined. Publicly stating under oath that he had certain knowledge of two judges, a county attorney, another attorney and unnamed "others" conspiring to have fixed a case, was another matter.

Practicing attorneys should note well several suspensions of attorneys for practicing law while on restricted status for Continuing Legal Education deficiencies.⁶ Some disciplines have also been imposed for practicing law after automatic suspension for failure to pay attorney registration fees.

C. Other Cases.

The only significant U.S. Supreme Court attorney discipline case was argued in January 1990, but not yet decided at this writing. In re Peel, 534 N.E.2d 980 (Ill. 1989), ___ U.S. ___ (1990) presented the question of whether an attorney was constitutionally protected from discipline for holding himself out as a certified trial specialist when Illinois has not recognized a civil trial specialty. Several years ago the Minnesota Supreme Court held that specialist certification advertising was protected in certain circumstances. In re Johnson, 341 N.W.2d 282 (Minn. 1983). The Minnesota Board of Legal Certification now regulates such matters.

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In re Wertz, 442 N.W.2d 781 (Minn. 1989); In re Beman, 451 N.W.2d 647 (Minn. 1990), In re Cargill, 444 N.W.2d 565 (Minn. 1989).

III. NEW RULES AND RULE AMENDMENTS UNDER CONSIDERATION.

A. Amendments to Minnesota Rules of Professional Conduct.

The Minnesota Supreme Court, effective January 1, 1990, amended several rules of professional conduct. The most important of these amendments forbade harassment of a person on the basis of sex, race, and certain other categories, "in connection with a lawyer's professional activities." Attached at A. 2 is a Bench & Bar article summarizing the changes to the Rules of Professional Conduct.

Another important amendment, to Rule 1.15, provided that lawyer trust accounts must be maintained only in financial institutions which agree to report trust account overdrafts to the Director's Office. The rule requires the financial institution to file a written agreement with the Director's Office.

On May 1, 1990, the Director's Office mailed information concerning this rule, and a form agreement, to approximately 800 financial institutions which maintain IOLTA accounts. Those banks which return the executed agreement will be certified to maintain lawyer trust accounts. In July 1990 the Director's Office will publish a list of certified financial institutions.

The Director's Office has instituted procedures to handle overdraft notifications received pursuant to the amendment. Based on experience in other states, about 200 overdraft notifications are anticipated each year. The attorneys involved will be requested to provide an explanation of the overdraft. A disciplinary file will be opened only if the explanation is

insufficient, a pattern of trust account irregularities occurs, or for some other reason a comprehensive trust account audit is indicated.

Setting up the overdraft notice program has required considerable staff time. Staff of the IOLTA Board provides bank mailing labels and computer support. After initial implementation the program will be handled by one legal assistant under the supervision of a Senior Assistant Director.

B. Rules on Lawyers Professional Responsibility.

The Rules on Lawyers Professional Responsibility were last amended by the Minnesota Supreme Court in 1987. At its June 1990 meeting, the Board will begin considering an extensive series of proposals for further amendments to the Rules. Some of the proposals have to do with increasing decisional options by Board members, both on complainant appeals and after determinations of no probable cause. Others include a reciprocal discipline rule, to deal with the increasing number of lawyers who are licensed in Minnesota and at least one other jurisdiction, and are subject to discipline proceedings in the other jurisdiction. Most of the proposals being considered would be directed toward fine-tuning the Rules, rather than introducing structural changes based on a new approach to procedures.

The Dreher Committee recommended that in approximately five years the Board and Court consider whether a new review of the professional responsibility system should be undertaken. With the report of the McKay Commission expected in 1991, there will

be an additional reason for considering whether there should be a thorough review of the system.

IV. DIRECTOR'S OFFICE.

A. Budget.

1. FY'90 Budget.

In January 1990, a request was made to the Supreme Court for the Lawyers Board to exceed its original budget by \$42,000. The majority of the increase was due to the extraordinary increase in complaints and serious cases during 1989. The remainder of the increase is related to implementation of the trust account overdraft notice program. Even with these budget increases, income for the fiscal year is still expected to exceed projected expenditures.

2. FY'91 Budget.

The FY'91 proposed budget increased by almost 20 percent. The increase is due primarily to the increased workload in the Director's Office. The \$1,294,763 budget includes an additional attorney and additional word processing hours. Approximately \$8,000 had been allocated for an employee to handle the trust account overdraft program. The only other major budget item is a \$65,000 expenditure for a proposed new computer system.

B. Administration.

1. Computerization - TCIS.

Programming services and support from the State Information Systems Office (ISO) have not been generally available for the Office of Lawyers Professional Responsibility in recent years. This is primarily due to the personnel resource limitations at

ISO which requires that personnel be allocated to projects with application to the largest user base. ISO programming for the Lawyers Board has little, if any, application to other ISO users.

After discussions with ISO and Supreme Court administration in October 1989, the decision was made to investigate alternatives to the TCIS system. In February 1990, a contract was entered into with Shared Resource Management a private consulting firm, to provide the Office with a "needs assessment." The needs assessment will explore three alternatives:

- (a) Continuing to utilize the TCIS system and obtaining a separate system for statistical reporting. This alternative would require that data on the TCIS system be downloaded to the separate system on a regular basis.
- (b) Abandoning the TCIS system altogether and purchasing a local area network to be utilized solely by the Lawyers Board.
- (c) Programming new software for the Supreme Court's Honeywell mainframe computer with specific application for the Lawyers Board.

The needs assessment process is in the final stages. Lawyers Board members Ronald Snell and William Maupins have been appointed to a computer committee to review recommendations presented by Shared Resource Management. The needs assessment will examine the advantages and disadvantages of each alternative and also provide cost estimates. It is hoped that

recommendations can be made to the Board and Court at their June 1990 meetings.

2. Trust Account Brochure.

In June 1989, a brochure entitled "Attorney Business and Trust Accounts: Books and Records Requirements and Sample Trust Account Transactions, Trial Balances and Reconciliations" was mailed to approximately 13,000 Minnesota judges and lawyers. The brochure provides examples of the required trust account books and records as well as sample trust account transactions and how they should be recorded. The brochure has been used extensively in educational presentations at Continuing Legal Education programs and at the law schools. The brochure is also being provided to new lawyers upon their admission to the bar.

Requests have been made by other lawyer discipline and client protection agencies to reproduce certain portions of the brochure. The favorable response and subsequent demand for the brochure required a re-printing in October 1989.

3. New Professional Responsibility Brochure.

A new general information brochure has been completed for distribution to complainants, inquirers and others. A copy is re-printed at A. 4 and 5. Plainer language and a clearer format should make the brochure helpful. The brochure is also designed to help route complaints and questions properly.

C. Personnel.

Attached at A. 6 is the current Office organizational chart. For FY'91 there are twenty-one full-time employees and a half-time word processor. The Office budget also pays a

percentage of three Supreme Court employees salaries. The number of full-time employees has not increased for four and one-half years.

In FY'90 there were only two personnel changes. Disciplinary clerk Lisa Bigelow resigned and the position was filled by a promotion from within by Cheryl Sheak. Cheryl's vacancy as file clerk was filled in August 1989 by Mary Jo Wendel. Legal assistant Valerie Jones resigned and was replaced by Karen McMahon.

Cindy Triebold Mellin, a legal assistant in our Office from 1981-1984, returned this year to substitute during another legal assistant's maternity leave. Cindy has stayed on staff to assist with the large caseload and has been retained to work through another maternity leave coming up in July.

Attorney Wendy Willson Legge was promoted to Senior Assistant Director this year. She has been on staff since 1987.

The stability of the staff continues to remain remarkable. In 1990, nearly two-thirds of the staff will have been employed five years or longer.

D. Trusteeships.

Under Rule 27, Rules on Lawyers Professional Responsibility, the Supreme Court may appoint the Director, or any lawyer as trustee when an attorney abandons practice or otherwise becomes unable to carry on practice, and no other arrangements are made. In the last several years, the Director has served as trustee in several cases each year. Occasionally, private attorneys volunteer their time to serve as trustees.

The most important aspects of several trusteeships are summarized below. Of special note are the following.

The Director was appointed trustee in the Skonnord matter, one of the largest trusteeships the Director has ever administered. In the Heikens matter, three attorneys were appointed co-trustees for the client files of an attorney who was psychologically disabled. The trustees requested that the Director take possession of and inventory Heikens' closed files. Heikens, with over 60 boxes of files, is the largest trusteeship ever.

The Director continues to serve as trustee concerning the law firm trust account only of Bruce C. Douglas. Currently, the Director is awaiting action by the Attorney General or court determination as to whom the trust funds should be paid. The remaining client files of John J. Flanagan, for which the Director was discharged as trustee in December 1986, were destroyed except for several wills, which were filed with the appropriate probate courts.

The Director is also in possession of client files of several closed trusteeships which were commenced prior to fiscal year 1990: Robert T. Stratton, Mark A. Sampson, Joel R. Thompson, Diana Smith Logan (see below), and Wayne Wentworth (see below).

1. Wayne Wentworth.

On August 31, 1988, the Court appointed the Director as interim temporary trustee for the client files of Wayne Wentworth. The Director took possession of 184 client files. 73 files were returned and 16 were destroyed at the client's request. Correct addresses for 57 files could not be found,

and there was no response concerning 19 files. 19 files contained no address. 7.5 attorney hours, 23 legal assistant hours, and 22 clerical hours were expended. \$63.91 was spent for postage to return the files by mail.

The Director was discharged as trustee on July 20, 1989.

2. Diana Smith Logan.

In April 1989, the Director was appointed trustee for the client files of Diana Smith Logan. Due to the disarray of the files, it could not be determined by the fiscal year 1989 annual report how many clients and files were involved.

It was determined that there were 258 client files. 99 files were returned and 10 were destroyed at the client's request. Correct addresses for 111 files could not be found, and there was no response concerning 34 files. Four files contained no addresses. Two attorney hours, 13 legal assistant hours, and 30 clerical hours were expended. \$134.82 was spent for postage to return the files by mail.

The Director was discharged as trustee on September 15, 1989.

3. James T. Skonnord.

In July 1989, the Court appointed the Director trustee for the client files of James T. Skonnord. 1,001 client files were removed from Skonnord's office. 217 files were returned and 38 were destroyed at the client's request. Correct addresses for 545 files could not be found, and there was no response concerning 144 files. Three files contained no addresses. Seven attorney hours, 49 legal assistant hours, and 120 clerical hours were expended. \$336.42 was spent for postage to return the files by mail, and \$409.58 for supplies (postage envelopes, postcards, mailing labels).

4. Steve G. Heikens.

On February 23, 1990, William D. Foster, Donna L. Roback, and Douglas A. Hedin were appointed trustees for the client files of Steve G. Heikens, due to Heikens' psychological disability. The trustees took possession of Heikens' open files, and instructed the Director to take

possession of and inventory the closed files. The Director has done so, determining that over 175 client and over 215 files are involved. The Director is currently awaiting permission from the trustees to begin notifying the clients and returning the files.

E. Probation.

During 1989, the probation department strengthened its monitoring of probationers' compliance with terms and conditions of Supreme Court ordered or private stipulated probations. The Office increased the amount of attorney and legal assistant time devoted to this function. Efforts have been made to shorten the time for locating and appointing supervisors. When significant delays are encountered, probationers now report directly to this Office. Monthly file inventories of all current client matters are routinely requested from probationers to help structure a practice of handling matters in a prompt and appropriate manner. Probationers are required to meet personally with their supervisor at least once per quarter. Quarterly supervisor reports are reviewed for completeness. Supplemental reports are requested as necessary to clarify questions about compliance. If a complaint is filed against a probationer, the supervisor is informed of the complaint and its disposition.

Unsupervised probations are also monitored in certain ways by the probation department. Routine reports and documentation of compliance are requested from probationers. The Office's review of books and records help bring probationers' trust account procedures into compliance.

Not all probations are successful. Some probationers fail to cooperate with their supervisors or the probation department.

In 1989, seven probations were revoked or extended. Only two of the seven unsuccessful probations were private probations. All involved additional client related misconduct and four involved chemical dependency or mental health problems.

A second annual meeting for supervisors was held in connection with the District Ethics Committee fall seminar. Volunteer supervisors continue to play an important role in the success of probation.

1. File Totals.

Total probation files as of 1/1/89	67
Probation files opened in 1989	25
Probations files closed in 1989	31
Total probation files as of 1/1/90	61

2. 92 attorneys were on probation during some portion of 1989.

- a. 45 Court-ordered probations (22 of whom were reinstated after being suspended from the practice of law)
 - 25 supervised (12 reinstated after suspension)
 - 20 unsupervised (10 reinstated after suspension)
- b. 47 stipulated private probations
 - 22 supervised
 - 25 unsupervised

3. Files Involving:

Client-Related Violations	62
Non-Client-Related Violations	30

4. Areas of Misconduct*

Neglect/Non-comm.	46	Conflict of Interest	5
Taxes	22	Criminal Conduct	4
Books and Records	19	Failure to Return Client	
Misrepresentation	11	Property/File	4
Non-cooperation	9	Unauthorized Practice	3
Misappropriation	7	Illegal fees	0
Other	7		

14 files involved chemical dependency (abuse of alcohol/drugs);
15 involved psychological disorder.

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

5.	<u>Closed in 1989:</u>	31
	Successfully completed probations	25
	Revoked probations	6
6.	<u>Probation extended in 1989:</u>	1
7.	<u>Time by Probation Department Staff (per week):</u>	
	5.0 hrs. Attorney	
	8.4 hrs. Legal Assistant	

F. Advisory Opinions.

Telephone advisory opinions concerning questions of professional responsibility are available from the Director's Office to all licensed Minnesota attorneys and judges. Under certain circumstances, written opinions are also available. The advisory opinions issued by the Director's Office are the personal opinion of the attorney issuing the opinion and are not binding upon the Lawyers Board or the Supreme Court. The Director's Office does not provide advisory opinions concerning: (1) advertising issues; (2) questions of law; (3) the conduct of another lawyer; and (4) past conduct.

During 1989, 948 telephone opinions were issued. This is an increase from 1988, when 815 telephone opinions were issued. There were also 37 written opinions issued in 1989. Some of the increase in the telephone advisory opinions was attributable to questions concerning the trust account brochure distributed by

the Director's Office in May 1989. The number of trust account inquiries in 1989 was nearly double the number received in 1988.

Conflict of Interest	20%
Client Confidences	11%
Trust Accounts	7%
Advertising and Solicitation	7%
Return of Client Files	6%
Fee Agreements and Fees	6%

Four senior assistant directors devoted 252.90 hours to advisory opinion matters. This figure represents only a slight increase from 1988, when 251.40 attorney hours were expended. Legal assistants contributed 21.75 hours. This figure is down considerably from 1988, when 53.25 hours were contributed. This continuing decrease is attributable to the computerization of statistical compilation.

In June 1989, Opinion No. 13 of the Lawyers Professional Responsibility Board was issued by the Board. Opinion No. 13 concerns attorney obligations with respect to return of client files and copying charges associated with client files.

G. Judgments and Collections.

Although judgments awarded in 1989 decreased from those awarded in 1988 for approximately the same number of attorneys, collection of costs increased slightly. Approximately 40 percent of the costs awarded in 1989 have been collected to date. As of the date of the 1989 annual report, 36 percent of the 1988 costs awarded had been collected. Because some additional 1988 costs

were collected in the 1989-90 fiscal year, 44 percent of the 1988 costs have been collected to date.

Costs were collected in 1989 for one judgment awarded in 1986. In addition, the Court awarded the Director bad faith attorney's fees in one case in 1989.

1. Costs Awarded in 1989. (34 attorneys)	\$32,824.25
2. Costs Collected in 1989 for 1989 Dispositions. (15 attorneys)	\$11,433.76
3. Costs Collected in 1990 for 1989 Dispositions. (5 attorneys)	<u>1,831.80</u>
4. Total Costs Collected to Date for 1989 Dispositions.	\$13,265.56
5. Costs Collected in 1989 for 1986 Disposition. (1 attorney)	700.00
6. Costs Collected in 1989 for 1988 Dispositions. (5 attorneys)	3,020.00
7. Unpaid Judgments as of January 1, 1989. (1980-1988)	\$78,972.45
8. National Discipline Data Bank Reports	49
H. <u>Professional Corporations.</u>	

Under Minn. Stat. § 319A.18, the Lawyers Professional Responsibility Board is granted the authority to make such rules as are necessary to carry out the provisions of the Professional Corporations Act. The Professional Corporations Act contains limitations on the structure and operation of professional

corporations. The Act also requires that annual reports, accompanied by a filing fee, be filed with the Board. The Board has not formally adopted any rules in this area. The Director's Office has, since 1973, monitored the reporting requirements of the statute. Annual report forms with certain minimal documentation requirements and filing fees are sought from all known legal professional corporations. Although the statutory authority exists to revoke the corporate charter of professional corporations which fail to comply with the reporting requirements, the cost of this has proven to be prohibitive.

The following are the statistics for the professional corporation department as of May 4, 1990:

705	@	\$ 25.00	\$17,625.00
24	@	100.00	<u>2,400.00</u>
			<u>19,650.00</u>
11	for	1,250.00*	<u>1,250.00</u>
			<u>21,275.00</u>

*Funds collected for fees owed for 1988 and prior years.

Total Attorney Hours: 18

Total Non-attorney Hours: 206

The professional corporation department is staffed by an Assistant Director, legal assistant, and file clerk. The professional corporation roster and statistical data have been transferred to computer.

I. Complainant Appeals.

During 1989, the Director's office received 211 complainant appeals, compared to 218 such appeals in 1988. This is approximately 17 percent of files closed, down 2 percent from 1988. Board members made 199 determinations, five of which recommended further investigation and one of which was directed to be heard before a panel. The remainder affirmed the Director's disposition. A total of 177 clerical hours were spent in 1989 processing the appeal files, as well as an unrecorded amount of attorney time.

J. Disclosure.

1. Source and Number of Requests for Disclosure.
Calendar Year 1989.

	<u># of Requests</u>	<u># of Attorneys</u>	<u>Discipline Imposed</u>	<u>Matters Pending</u>
1. Nat'l Conf. of Bar Exam.	137	127	0	1
2. Individual Attorneys	29	29	1	1
3. Local Referral Services	55	228	0	0
4. Governor's Office	5	53	0	0
5. Other State Disc. Counsels of Bar Offices	82	82	1	0
6. F.B.I.	20	20	0	0
7. Miscellaneous	<u>36</u>	<u>274</u>	<u>3</u>	<u>0</u>
TOTAL	364	813	5	2

2. Department Function.

The disclosure department responds to requests for attorney disciplinary records. Such requests must be accompanied by the attorney's waiver of confidentiality.

There was a 47 percent increase in the number of disclosures in 1988 compared to 1987, due principally to requests from the newly established specialist certification program of the Minnesota State Bar Association (reported above under "miscellaneous"). The department received an even larger number of requests from the M.S.B.A. in 1989. The total number of disclosures in 1989 was 8 percent higher than in 1988.

Responding to disclosure requests continues to require a significant amount of clerical time, particularly in researching the disciplinary histories of the attorneys who are the subjects of the requests. Attorney and legal assistant time remains small.

V. LAWYERS BOARD.

The membership of the Lawyers Board has changed by nearly one half in the last two years. A good deal of the Board's time has been spent in integrating the new and old members into a cohesive Board. The increase in complaints and allegations of serious misconduct has also resulted in a large increase in the number of Lawyers Board Panel hearings, particularly in the first five months of 1990.

The Opinion Committee of the Board also has been active. The Board approved its proposal for Opinion 13, dealing with

copying costs and delivery of a file upon termination of representation. A copy of an article stating and summarizing Opinion 13 is attached at A. 7 and 8.

At the Board's June meeting it will consider a proposal of the Opinion Committee for issuing an opinion on the subject of attorney liens on homesteads. This subject has been controversial for many years, since the Court's opinion in Northwestern National Bank of South St. Paul v. Kroll, 306 N.W.2d 104 (Minn. 1981). The issue is of particular importance for the family law bar, and the Family Law Section has submitted comments on the issue.

VI. DISTRICT ETHICS COMMITTEES.

The Minnesota system of utilizing volunteer district ethics committees (DEC) has this year faced its greatest challenge since its inception. The volume of files referred to the DECs increased significantly. The average number of files in the DECs at the end of last year was 140. The overall average number of files for this year was 178. There were 194 files pending at the DECs in April 1990. This increase in the number of files is a direct result of the increase in the number of complaints received by the Director's Office.

Although the increase in volume has led to an increase in the average age of DEC files, the overall average age for the year was 1.8 months. This remains below the goal of two months set by the Board's Executive Committee in 1985.

There were, however, several months in the past year when the average age exceeded two months. Affirmative steps have been

taken to reduce the average age and to keep it below the established goal.

The Fourth DEC has, by far, the largest workload with a case volume averaging 90 cases over the course of the year. By April 1990 the average file age in the Fourth DEC was three months. To meet the increased volume and file age, the Fourth DEC has increased its size, has scheduled additional meetings, has held a meeting devoted exclusively to considering its oldest files, and has implemented administrative procedures designed to promote prompt completion of investigations. The Director's Office has withdrawn several files. The effect of these considerable efforts will be closely monitored in coming months.

The DECs are an important part of the disciplinary process. They provide an initial peer review of complaints with the opportunity for input from public members. The efforts of the volunteer members of the DECs have greatly contributed to the disciplinary system. The increased demand on the time of the volunteers has not resulted in a decrease of quality. The quality of the DEC investigative reports remains high. The Director's Office continues to serve as a resource to the DEC investigators. An Assistant Director is assigned to each DEC as a liaison, available for assistance with any questions or problems which might arise in the course of an investigation.

VII. FY'91 GOALS AND OBJECTIVES.

The Lawyers Board will be considering numerous possible amendments to the Rules on Lawyers Professional Responsibility.

This would be the first thorough review of the Rules in several years.

The Board will also be considering the recommendations of its Opinion Committee in the coming year, including the long-standing and difficult issue of attorney liens on homesteads.

The Board will also begin to consider the timing and form of a new review of the professional responsibility system. The issues to be addressed by the ABA McKay Commission in August 1991 would obviously be relevant to such a review, as would the Dreher Committee's recommendation in 1985 that the Court consider further review in about five years.

Workload is another matter that the Board may have to consider. Panels have met far more regularly in the last year or so than in the preceding couple of years.

The Director's Office will also have to focus primarily on workload. The continuing increase in complaints and in serious matters has stretched the Office's resources. It is hoped that the addition of a staff attorney, improvement in the computer system and addition of word processing resources will make the workload manageable.

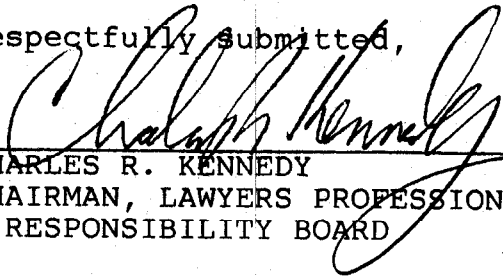
The Office will need to meet several administrative challenges in the coming year. The full implementation of the trust account overdraft notice program will begin in July. The choice among alternatives for a computer system will need to be made in the coming months. The Office quarters themselves have not been enlarged, except for the addition of storage space,

since 1985. With the move of the Office to the Judicial Center still several years away, various projects are being undertaken to utilize space more efficiently.

The annual reports in the last several years have noted various challenges and controversies, but over all describe a pattern of stability and statistical improvement. For the first time since 1985, it must be reported that there has been a dramatic increase in complaints, particularly serious complaints. Among these, cases of large-scale misappropriation are most troubling. In sum, it is perhaps a good time again to take a long look at the overall professional responsibility system, and the challenges it must face, with a view toward making a comprehensive set of reports and recommendations to the Court in the coming years.

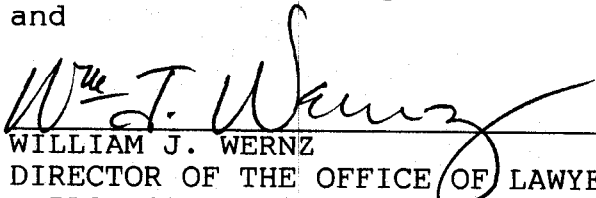
Dated: June 22, 1989.

Respectfully submitted,



CHARLES R. KENNEDY
CHAIRMAN, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

and



WILLIAM J. WERNZ
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY

DEC SUMMARY AND REPORT - MAY 1990

MONTHS OPEN	12	11	10	9	8	7	6	5	4	3	2	1	0	TOTAL	DEC STATUS CODES
DEC #/ATTY															
DEC 1 - KLJ								1	0	0	0	1	4	6	
DEC 2 - WWL *									1	4	3	11	18	37	1 Assigned to DEC
DEC 3 - BMS											1	2	4	7	2 Reassigned to DEC
DEC 4 - PRB**	0	4	0	1	3	0	3	6	22	8	19	21	22	109	3 DEC 1 to be issued
DEC 5 - KLJ													0	0	4 DEC 2 to be issued
DEC 6 - BMS													0	0	5 DEC 3 to be issued
DEC 7 - BMS												5	2	7	6 DEC 4A to be issued
DEC 8 - BMS													1	1	7 DEC 4B to be issued
DEC 9 - BMS										1	0	2	0	3	8 DEC 5 to be issued
DEC 10 - BMS													0	0	9 Extension granted
DEC 11 - WWL												2	0	2	10 Report at DEC
DEC 12 - KLJ													0	0	
DEC 13 - BMS												1	2	3	70 Status of file requested
DEC 14 - WWL												2	2	4	71 Min rec'd - wait file
DEC 15 - WWL												2	3	5	72 Min rec'd - refer panel
DEC 16 - KLJ													0	0	73 DEC 1B to be issued
DEC 17 - KLJ									1	0	0	0	0	1	74 Report rec'd; will be taken
DEC 18 - KLJ									1	0	2	0	2	5	off next month's report
DEC 19 - KLJ											1	0	1	2	
DEC 20 - WWL													0	0	
DEC 21 - KLJ											1	1	0	2	
														0	
TOTAL FILES	0	4	0	1	3	0	3	7	25	13	29	50	59	194	
														0	
NO. OF MOS.	0	44	0	9	24	0	18	35	100	39	58	50	0	377	
AVERAGE NO. OF MONTHS IN DEC						1.9									
*2ND DEC AVERAGE						0.9									
**4TH DEC AVERAGE						2.7									
ALL OTHER DECS AVERAGE						1									

A.1

Amending the Rules . . .

On December 14, the Minnesota Supreme Court will hear presentations and consider whether to amend the Minnesota Rules of Professional Conduct. The Lawyers Board and the Minnesota State Bar Association have both filed petitions for amendment.

The subjects of the proposed amendments are diverse: harassment, client confidentiality, tax returns, advertising, and the trust account overdraft notice program. While the subjects are various, the proposed changes are not extensive. Indeed, in the four years in which the "new" rules have been in effect, they have served their purpose well without any other changes.

Harassment Rule

The MSBA proposes to add a new section to Rule 8.4, providing:

It is professional misconduct for a lawyer to:

(g) Harass a person on the basis of sex, race, age, creed, color, national origin, disability, sexual preference, or marital status.

This proposal arises from two sex harassment discipline cases decided by the Court in 1988. The provision of the old code which was used to impose discipline did not specifically refer to harassment and has not been carried forward into the rules.

The Lawyers Board recommends adding to the proposed rule the words, "in connection with a lawyer's professional activities." Similar language had been recommended by an MSBA committee which studied the

matter, but the language was deleted in the House of Delegates. The current MSBA proposal would proscribe harassment even when it occurred outside the lawyering setting and even when the victim did not know the harasser was a lawyer. The Lawyers Board strongly supports the harassment rule, but believes its scope should be confined to lawyering activities.

Trust Account Overdraft Notice

The other proposal by the MSBA is to amend Rule 1.15 to provide for adoption of what is essentially an ABA model program for automatic notice of overdrafts on trust accounts. (See "Overdraft Notice Rule," *Bench & Bar* 45:9 (Nov. 1988), p. 14.) Like the Interest on Lawyer Trust Account program, the overdraft notice program would involve financial institutions in which lawyers have trust accounts automatically notifying the Director's Office of overdrafts. The Director's Office would screen the notices to determine which were merely clerical in nature, and would not open formal investigation files unless it appeared that misconduct may have occurred. Based on experience in other jurisdictions, it is expected that most overdrafts will be products of error; but that some trust account shortages will be revealed through the program. The Lawyers Board supports this MSBA proposal.

Confidentiality

The Lawyers Board proposes to amend Rule 1.6 so that a lawyer may disclose confidential information

"necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used." The proposal, which roughly tracks the longstanding crime-fraud exception to the attorney-client privilege, means to allow lawyers more discretion to reveal when the lawyer has been misused to perpetrate harm. (See Charles E. Lundberg, "On Ethics and Expediency," *Hennepin Lawyer* 52:4 (March/April 1983), p. 13.) A perfect balance will never be struck between the competing claims of confidentiality and social fairness. Professional rules have generally restricted attorney disclosures more broadly than have the statutory or common law attorney client privilege.

Tax Returns

For over 15 years, the Court has disciplined attorneys for failure to file tax returns on a timely basis. The Lawyers Board proposes an addition to Rule 8.4 that would reflect these holdings. There is no intent to expand the Court's holdings to new areas. The intent is merely to provide additional notice of what is by now longstanding law. The text of the addition is:

It is professional misconduct for a lawyer to fail to file federal or state individual income tax returns, corporate income tax returns, partnership income tax returns, or employer's withholding tax returns within the time required by law.

In a related development in case law, the Minnesota Supreme Court on September 22 filed an order stating:

Ever since our decision in *In Re Bunker*, 294 Minn. 47, 199 N.W.2d (1972), in a number of cases this court has reiterated its dictum that the appropriate sanction to be imposed in an attorney disciplinary case for failure to file income tax returns is suspension or disbarment. In this case, the recommendations of the referee, as well as the stipulation entered into between the Director and the Respondent, call for a substantially less onerous sanction. We decline at this time to accept the recommendation of the referee or the stipulation between the parties. Instead, we order the parties to brief and argue the issue of whether or not the dictum in *In re Bunker* should be reconsidered, continued, modified or revised. File No. C8-88-782.

As it happens, this case is the only tax matter now pending in the director's office or before the Court. The Court will have the opportunity to consider disciplinary policy in tax matters in both the rulemaking and case law contests.

Advertising Rule

Rule 7.2, advertising, currently requires that advertisements or legal services, "shall include the name of at least one lawyer" responsible for the content of the ad. The Lawyers Board proposes an amendment to make clear that a *Minnesota* lawyer must be responsible for ads for services to be performed by Minnesota lawyers.

By December 1, anyone desiring to be heard on the proposed Rule amendments must file a written statement and any request to make an oral presentation before the Court. Twelve copies of such filings must be made with the clerk of appellate courts.

For the future, the MSBA has appointed a committee, chaired by Minneapolis lawyer Walt Bachman, to consider whether any further amendments should be proposed. Great interest in the rules seems indicated from the initial committee membership of nearly 40 persons, including several nonlawyers. For its part, the Lawyers Board will both work with this committee and voice its own proposals where appropriate. **2b**

plaints against lawyers. The Office is supervised by the Lawyers Professional Responsibility Board, which has nine non-lawyer and fourteen lawyer members. Volunteer district ethics committees around the state help investigate complaints.

• **Reviewing Complaints**

About two weeks after receiving a complaint, the Office will respond in writing. The response will state whether the complaint will be investigated or be summarily dismissed. Examples of complaints that are often summarily dismissed include: routine fee disputes; complaints about minor personal misconduct by a lawyer outside the practice of law; most matters pending in court, unless the misconduct is clear and serious; most complaints against court-appointed counsel; and other matters that are not best handled as ethics or discipline matters.

• **Investigation**

Most complaints are investigated by local district ethics committees. These committees typically contact the complainant and the lawyer, and review the important documents. The committees then recommend to the Office of Lawyers Professional Responsibility whether discipline is warranted.

• **Decision**

The Office of Lawyers Professional Responsibility decides whether the attorney violated a rule of professional conduct. If so, some discipline is appropriate. There are a variety of disciplines available. The most common is an "admonition." Admonitions are issued when the lawyer's misconduct was isolated but relatively non-serious - for example, the neglect of a single file. Any private discipline decision may be appealed by the complainant to a member of the Lawyers Board. About 125-150 lawyers are privately disciplined each year.

• **Supreme Court Discipline**

Very serious violations of the rules can result in discipline by the Minnesota Supreme Court. Offenses such as taking money,

crimes, intentionally false statements to a court and abandonment of several clients, can result in the loss of an attorney's license to practice law. All discipline proceedings before the Supreme Court are open to the public. The Court disciplines about forty lawyers each year.

• **Information**

If you file a complaint, the Office of Lawyers Professional Responsibility will keep you informed about the status of investigations and proceedings. The final decision is always made available to you in writing and with an explanation.

• **What the Office of Lawyers Professional Responsibility Cannot Do**

The Office of Lawyers Professional Responsibility cannot:

- represent people in any legal matter or give legal advice.
- take money or property from a lawyer to return to a client or creditor.
- sue a lawyer for careless work, nor do work a lawyer failed to do.
- change the fee a lawyer charged or require a refund, even if the fee is clearly excessive.

The Office of Lawyers Professional Responsibility is limited to investigating complaints of unethical conduct and taking disciplinary action against lawyers when appropriate.

• **Client Security Fund**

The Minnesota Supreme Court has established a Client Security Fund to pay genuine claims against attorneys who have intentionally and dishonestly caused clients to lose money. Further information can be obtained from the Office of Lawyers Professional Responsibility.

• **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 Office of Lawyers Professional Responsibility 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 to this Office or its investigators, "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 when necessary for investigation. One exception to this rule is Supreme Court filings and hearings, including trials before Supreme Court referees, which are open to the public.

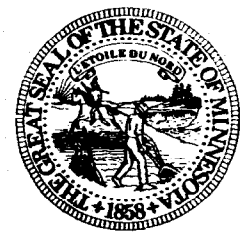
• **Conclusion**

The Office of Lawyers Professional Responsibility provides a service to the public and the legal profession, to review complaints that lawyers have acted unethically. This system is meant to be fair to complainants and lawyers, so that claims are promptly and reasonably considered.

You can ask further questions about lawyers professional responsibility by calling (612) 296-3952 (Outstate: 1-800-657-3601).

Office of Lawyers Professional Responsibility

Complaints and Investigations



Office of Lawyers Professional Responsibility
William J. Wernz, Director
520 Lafayette Road, First Floor
St. Paul, MN 55155
(612) 296-3952 (Outstate) 1-800-657-3601

What should you do if you believe a lawyer has acted unprofessionally? This pamphlet offers guidance in answering questions like:

- How should I handle a fee dispute?
- How can problems be prevented?
- What is the lawyers professional responsibility system?
- How do I file a professional responsibility complaint against a lawyer?
- What will happen if I file a complaint?
- Are there other ways of resolving problems with lawyers?

PREVENTING PROBLEMS WITH YOUR LAWYER

Many problems can be prevented if you know what to expect from lawyers and how to deal with lawyers. Suggestions for avoiding problems include:

• Have Realistic Expectations

Some people are dissatisfied with lawyers because they have unrealistic expectations. Ask your lawyer what to expect: How long will the matter take? About how much will it cost? What are the unpredictable factors?

• Fee Agreements

Many disputes come from lawyers and clients with different understandings about fees. Get a written fee agreement and ask for prompt billings.

• Cooperation

Furnish documents and information to your lawyer promptly. In return, expect the lawyer to keep you informed and to give you copies of important documents.

• Keep Current

If your address or phone number changes, let the lawyer know. If you change your mind about the legal matter, keep the lawyer informed.

• Communication

Expect the lawyer to keep you informed of all important developments. If you are dissatisfied, let the lawyer know why. Write to confirm all important understandings. Keep track of your telephone calls to the lawyer.

PROFESSIONAL RESPONSIBILITY PROBLEMS

Lawyers are expected to meet high standards. The standards for lawyers professional responsibility are set by the Minnesota Supreme Court, in the Rules of Professional Conduct. These Rules can be found at most libraries in the Court Rules volume of Minnesota Statutes. If a lawyer violates these rules, the lawyer may be disciplined.

Some problems with lawyers are handled through the Office of Lawyers Professional Responsibility. Others are not. Here are a few examples of complaints handled by this Office.

• Neglect and Delay

Do you think your lawyer has been taking far too long with your legal matter? Write to the lawyer and ask for a written explanation. If you do not get a satisfactory reply, you may file a complaint. Lawyers are required to be reasonably prompt and to keep clients reasonably informed.

• Getting Your File Back

A client may switch lawyers for any reason. Changing lawyers may increase expense or delay, but it is the client's choice to make. If you want your file from your lawyer, call and ask for it. If you don't receive it, send a certified letter repeating the request. If you still don't receive your file, or if your lawyer insists that you pay copying costs before you get it, file a complaint.

• Money and Accounting

Sometimes lawyers handle money for clients. Sometimes lawyers receive settlements or awards for their clients. When a lawyer handles client money, the lawyer must promptly and completely account for it. If there is any significant delay in receiving money from a lawyer or in getting a complete accounting, a complaint should be filed.

• Conflicts of Interest

Sometimes lawyers represent more than one client in a matter. In other situations a lawyer may represent a client and at a later

time be opposed to the former client. Sometimes the client may agree to the lawyer's work even though there is a conflict. If you believe that your lawyer is acting improperly in representing conflicting interests, you may file a complaint.

• Dishonesty

Lawyers are forbidden to make intentionally false statements. However, lawyers may represent their clients' interests aggressively. This may involve relying on the client's version of the facts. In lawsuits, most disputes about the facts are resolved by courts.

OTHER PROBLEMS

• Fees

Most routine fee disputes are best resolved outside the Office of Lawyers Professional Responsibility. The lawyer and client may be able to reach an understanding. Fee arbitration is a relatively fast and simple way of resolving fee disputes. You may call the Minnesota State Bar Association (612) 333-1183, for the address and phone number of your local fee arbitration committee. In a few instances, if a lawyer charges a clearly illegal or grossly excessive fee, discipline may result.

• Malpractice

Lawyers, like other professionals, sometimes make mistakes. A lawyer might handle a matter in a way that is inadequate but not unethical. If a client was damaged by a lawyer's negligence, a malpractice suit may be brought. Most malpractice and inadequate performance matters are not handled by the Office of Lawyers Professional Responsibility.

• Personal Behavior

Most complaints that involve behavior of an attorney outside the practice of law, such as use of profanity, landlord-tenant disputes and debtor-creditor matters, are not handled by the Office of Lawyers Professional Responsibility. Serious matters, such as fraud and criminal offenses, are subject to discipline.

• The Opponent's Lawyer

Can you complain against the other person's lawyer? Yes, but such complaints often fail to understand the adversary system of justice we have. Lawyers must represent their own clients aggressively. Such a system often produces different versions of the facts in lawsuits and a certain amount of hard feeling. Only flagrant abuses will be disciplined, and usually after a court has ruled on the matter.

• Complaints by Creditors

The Office of Lawyers Professional Responsibility is not a collection agency. Most complaints about lawyers not paying bills are best resolved in civil courts. However, in extreme cases disciplinary action may be taken—for example, a pattern of willfully unsatisfied and practice-related judgments, issuing checks on a closed account, fraud, etc.

• Complaints by Criminal Defendants

The Minnesota Supreme Court has directed that complaints by criminal defendants or convicts that their attorneys did not provide adequate representation, should be handled within the criminal justice system. If a court finds that an attorney acted improperly, discipline may result.

• Complaints Against Judges

Complaints against judges are handled by a separate agency, the Board on Judicial Standards (612) 296-3999.

HOW COMPLAINTS ARE HANDLED

• Filing a Complaint

Complaints should be sent to Office of Lawyers Professional Responsibility, 520 Lafayette Road, 1st Floor, St. Paul, Minnesota 55155, (612) 296-3952.

The complaint letter should include the writer's and lawyer's names and addresses, and a statement of the alleged unethical conduct. Copies of important documents should be included.

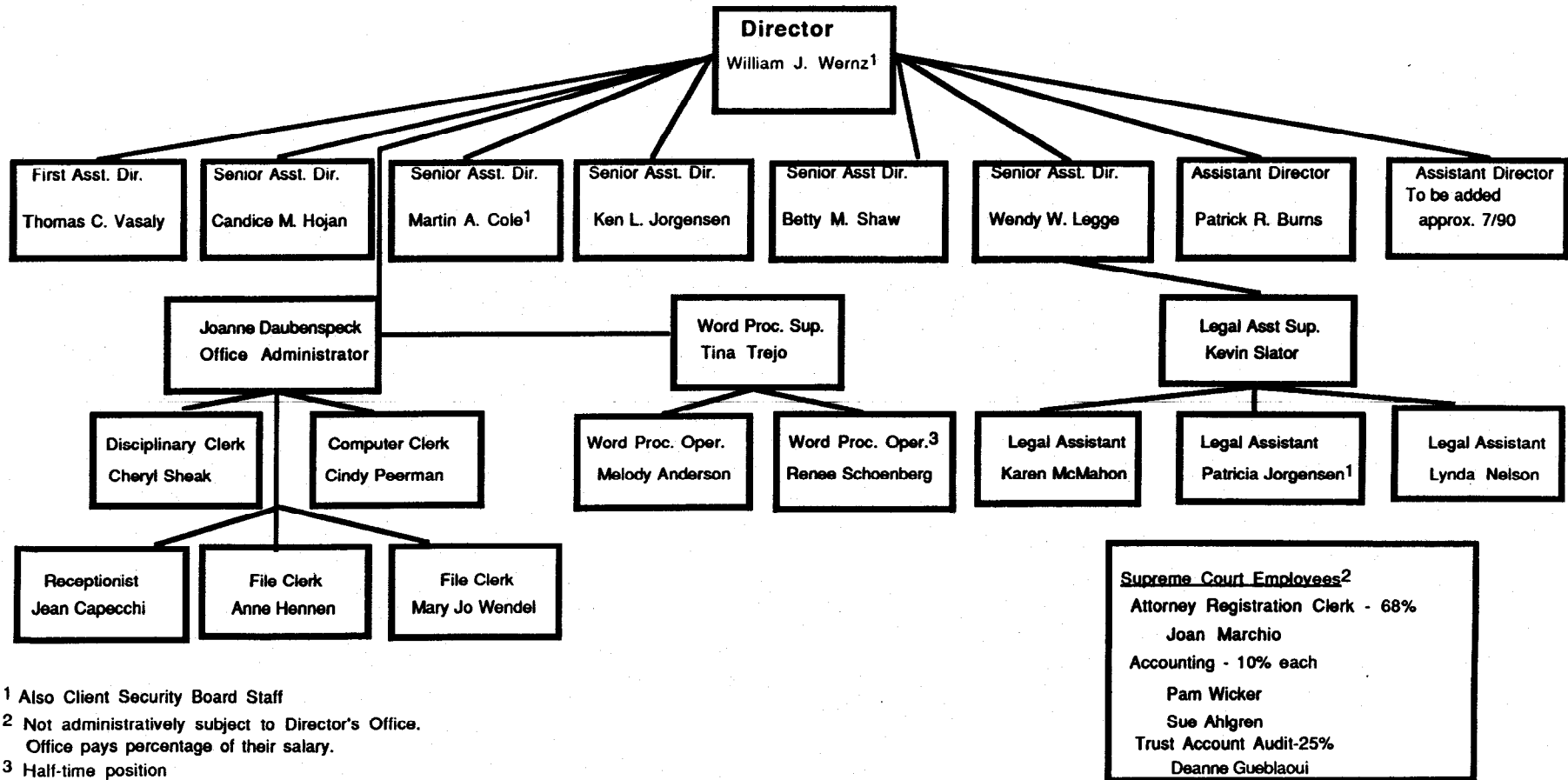
• Office of Lawyers Professional Responsibility

The Office is established by the Minnesota Supreme Court to investigate ethics com-

5/90

Office of the Director of Lawyers Professional Responsibility

A.6



¹ Also Client Security Board Staff

² Not administratively subject to Director's Office.
Office pays percentage of their salary.

³ Half-time position

Opinion 13: Copying Costs . . .

Disputes over fees and costs, and an attorney's right to hold property while the dispute is resolved, have led to numerous professional responsibility complaints over the years. The law needed to resolve these disputes — involving lien rights, contract and personal property law, and the Rules of Professional Conduct — seems disproportionately complex for resolution of what are often small commercial issues.

The Lawyers Professional Responsibility Board has, from time to time, attempted to give guidance on such disputes. The Minnesota Supreme Court has authorized the board to "issue opinions on questions of professional conduct." Among these opinions is Opinion 11, which in part provides, "It is professional misconduct for an attorney to assert a retaining lien on the files and papers of a client."

The board has recently issued Opinion No. 13, which further defines what are and are not "files and papers of a client" and which addresses professional responsibility obligations related to "Copying Costs of Client Files, Papers and Property." The board adopted Opinion 13 on the recommendation of the Board Opinion Committee, consisting of attorneys Rollin Whitcomb and Julius Gernes and public member Gwenyth Jones Spitz.

The issue of who bears copying costs has been addressed by numerous state and local ethics committees around the country. One appellate court, interpreting a statute and Rule 1.16(d), Rules of Professional Conduct, has determined that after termination of representation an attorney must deliver file

documents to a client without conditioning such delivery upon copying costs. *McKim v. State*, 528 N.E.2d 484 (Ind. App. 1988). Opinion 13 is consistent with the opinion of a majority of jurisdictions considering the issue.

Subject to certain exceptions, the general views of Opinion 13 are that:

1. File contents belong to the client and must be turned over to the client upon request.
2. Costs of creating a duplicate file for the attorney to retain must be borne by the attorney unless the client agrees in advance to bear the costs.
3. The lawyer may not hold the file until copying costs or legal fees are paid (See Opinion 11).

Several exceptions from these general statements are recognized. Unexecuted or unserved documents prepared by the lawyer, but not yet paid for, do not belong to the client; they do not have to be turned over to the client on request unless substantial prejudice, such as expiration of a statute of limitations, would otherwise result. In the nonlitigation setting, documents such as unexecuted estate plans would not have to be turned over to the client who has not paid for the lawyer's drafting services.

Opinion 13 is rooted in several rules of professional conduct: Rule 1.15(b)(4) (requiring prompt delivery of property "which the client is entitled to receive"); Rule 1.16(d) (providing that on termination of representation a lawyer shall take reasonable steps to protect a client, including "surrendering papers and property to which the client is entitled"); and Rules 1.5 and 8.4(d).

Rule 1.5 (requiring reasonable fees) is the basis for Opinion 13's statement that copying costs must be reasonable. Sometimes lawyers have refused to deliver client files until the client has paid a per page copying cost which greatly exceeds the cost a commercial service would charge. If the attorney cannot copy the file at a reasonable cost, the unreasonable excess should not be passed on to the client.

Rule 8.4(d) (forbidding conduct "prejudicial to the administration of justice") is another, somewhat more remote source for Opinion 13. Disputes between lawyers and clients over access to files can affect third parties. A client may be forced to request a continuance until the file is delivered, thereby affecting both the court and an opposing party. Moreover, a client's freedom to choose counsel can be compromised by a lawyer's withholding documents.

Lawyers routinely advise clients how to plan, during a harmonious business or personal relationship, for defining their rights and duties when the relationship is dissolved, harmoniously or otherwise. Attorney-client relationships also come to an end. It is hoped that Opinion 13, and Opinion 11, will clarify attorneys' rights and duties with respect to a client's file when representation is ended. The text of Opinion 13 is as follows:

Opinion No. 13: Copying Costs of Client Files, Papers and Property

Client files, papers and property, whether printed or electronically stored, shall include:

1. All papers and property provided by the client to the lawyer.
2. All pleadings, motions, discovery, memorandums, and other litigation materials which have been executed and served or filed regardless of whether the client has paid the lawyer for drafting and serving and/or filing the document(s).

3. All correspondence regardless of whether the client has paid the lawyer for drafting or sending the correspondence.
4. All items for which the lawyer has advanced costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses including depositions, expert opinions

and statements, and other materials which may have evidentiary value.

Client files, papers and property, whether printed or electronically stored, shall not include:

1. Pleadings, discovery, motion papers, memoranda and correspondence which have been drafted, but not sent or served if the client has not paid for legal services in drafting or creating the documents.

2. In nonlitigation settings, client files, papers and property shall not include drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have legal effect, where the client has not paid the lawyer for the services in drafting the document(s).

A lawyer who has withdrawn from representation or has been discharged from representation may charge a former client for the costs of copying or electronically retrieving the client's files, papers and property only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge. Such copying charges must be reasonable. Copying charges which substantially exceed the charges of a commercial copy service are normally unreasonable.

A lawyer may not condition the return of client files, papers and property on payment of copying costs. Nor may the lawyer condition return of client files, papers or property upon payment of the lawyer's fee. See Opinion No. 11 of the Lawyers Professional Responsibility Board.

A lawyer may withhold documents not constituting client files, papers and property until the outstanding fee is paid unless the client's interests will be substantially prejudiced without the documents. Such circumstances shall include, but not necessarily be limited to, expiration of a statute of limitations or some other litigation-imposed deadline. A lawyer who withholds documents not constituting client files, papers or property for nonpayment of fees may not assert a claim against the client for the fees incurred in preparing or creating the withheld document(s).