

C1-84-2140

ANNUAL REPORT OF THE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

OFFICE OF
APPELLATE COURTS

JUN 16 1994

FILED

ANNUAL REPORT OF THE
OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY

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June 1994

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I. INTRODUCTION AND HIGHLIGHTS.

Pursuant to Rules 4(c) and 5(b), Rules on Lawyers Professional Responsibility, the Lawyers Board and the Director are to report annually on the operation of the professional responsibility system. The Board's Report and the Director's Report are hereby jointly made for the period June 1, 1993, through May 31, 1994.

The findings and recommendations of the Supreme Court's Advisory Committee highlight this year's report.

Supreme Court Advisory Committee.

On January 28, 1994, the Supreme Court Advisory Committee to Review Lawyer Discipline in Minnesota and Evaluate the Recommendations of the American Bar Association ("Supreme Court Advisory Committee") submitted its final report to the Court. The Committee was charged with two tasks: 1) to evaluate the recommendations of the American Bar Association (ABA) McKay report, with respect to proposals for regulation of the legal profession; and 2) to update the 1985 report (Dreher Report) evaluating the Minnesota lawyer discipline system. The Committee, composed of ten lawyers and six non-lawyer members, heard over 30 witnesses provide input on the lawyer discipline system and the ABA recommendations, surveyed 400 complainants and respondent attorneys whose files had recently been closed, held a public hearing to take testimony, and interviewed current members of the Lawyers Professional Responsibility Board (LPRB) and the Director's Office. The Advisory Committee final report contains 32 recommendations. The major findings and recommendations of the Advisory Committee are as follows:

1. There is no greater user dissatisfaction with the lawyer discipline system in Minnesota than there is likely to be with any discipline system.
2. The Minnesota discipline system is basically sound and is working well.

The Advisory Committee also found that there is a high rate of complaint dismissal, because the conduct complained of does not constitute professional misconduct or is unrelated to lawyer discipline. The Committee found that there is a need to try new remedial systems not presently included in the discipline system.

The major recommendations of the Advisory Committee include the following:

1. The Supreme Court should request that the Minnesota State Bar Association, with assistance from the Director's Office, design and implement pilot programs involving mediation and mandatory fee arbitration.
2. The District Ethics Committees should continue to investigate discipline complaints.

Lawyers Board Opens its Meetings to the Public.

In September 1993, the Lawyers Board voted to open the policy making portions of its quarterly meetings to the public. The Board determined that opening the policy making aspects of the meetings was responsive to the public concern addressed in the ABA McKay report for more openness of disciplinary proceedings, without running afoul of the confidentiality requirements of Rule 20, Rules on Lawyers Professional Responsibility.

Leadership.

In contrast to last year's report, which noted numerous changes in leadership in the discipline system, this year has been marked by

relative stability at the Board and in the Director's Office. No new members have been added to the Board since February 1993. Attached at A. 1 is a list of the current Lawyers Board members. The only change in leadership this year has occurred at the Court -- Minnesota Supreme Court Justice M. Jeanne Coyne replaced Justice John E. Simonett in July 1993 as the liaison to the Lawyers Board.

Lawyers Board Opinion 17.

In June 1993, the Lawyers Board adopted Opinion 17 in response to concern from the bar over the sometimes substantial premiums being offered to lawyers and non-lawyer employees for services typically paid for by the client. A copy of the August 1993 *Bench & Bar* article publicizing the opinion is attached at A. 2.

At the request of the Director's Office, West Publishing for the first time published all of the Lawyers Board Opinions in the 1994 *Minnesota Rules of Court* desk book, following the other professional rules.

District Ethics Committee Accomplishments.

The district ethics committees ("DECs") continue to serve as a vital part of Minnesota's discipline system. The Supreme Court Advisory Committee carefully considered the issue of whether Minnesota should continue to use the volunteer DECs to investigate and make recommendations regarding discipline. The ABA McKay report strongly urged that the organized bar should play no role in lawyer discipline other than in an administrative capacity. Recommendation 4 of the Advisory Committee report concludes that the DECs should continue to investigate on references from the Director's Office complaints of lawyer misconduct. The comment to that recommendation notes that:

All of those testifying before the Committee reported not only their satisfaction with the use of the DEC's, but their support for the continued use of these committees: . . .

The Minnesota system both promotes lawyer involvement in the disciplinary process and provides good investigative services as a contribution by individual DEC members.

The Advisory Committee urged the Court to continue to monitor this aspect of the system to ensure that it maintains its effectiveness. For now, however, the DEC's help create a cost-effective and efficient means to investigate less serious complaints, as well as an excellent means to keep non-lawyers involved in the discipline system.

Professional Responsibility Seminar.

In contrast to recent years where the emphasis at the annual seminar has been more generalized professional responsibility topics, this year's seminar included many issues of immediate concern to the disciplinary system. The 1993 seminar focused on the recommendations of the Supreme Court Advisory Committee regarding alternative remedial systems in lieu of discipline. Janet Dolan and Robert Henson, co-chairs of the Committee, presented their report and engaged the audience in a spirited discussion about the need for the new programs. Hal Lieberman, Chief Disciplinary Counsel from the 1st Judicial Department of New York, presented New York's experiences with mediation of lawyer disciplinary complaints. The New York City Bar Association commenced a mediation program in 1989. Lieberman presented a video tape of a mock mediation in which he, Marsha Sims, past Chairperson of the New York City Association Mediation Project, and Carol Liebman, a professional mediator and clinical professor of law at Columbia Law School, participated.

Substantive topics were also covered by the Director's Office, including presentations on trust account issues and termination of representation. A copy of the program schedule is attached at A. 3-4. Because of scheduling conflicts associated with the upcoming move to the Judicial Building, the next annual seminar will be held in April 1995.

Educational Efforts.

While secondary to the function of investigation and prosecution of discipline offenses, the Director's Office continues to view as important the goal of educating the bar regarding professional responsibility issues. While the educational efforts are time-consuming, the Director's Office regards them as a means to reinforce and remind the profession to take its professional obligations seriously and thereby to prevent ethical misconduct. Educational efforts are accomplished by several means. The Director's Office continues to provide advisory opinions to lawyers -- this year 1,410 opinions were issued. Through the trust account overdraft program, the Director's Office works to educate lawyers about the proper maintenance of trust account books and records. The probation department and the volunteer supervisors work with lawyers to improve office procedures and monitor trust account procedures. Finally, the Director and Assistant Directors in the Director's Office have spoken at numerous CLE seminars, bar meetings and other law related functions. This year the Director's Office has provided speakers at approximately 48 law related functions.

Move to Minnesota Judicial Center.

After many years of planning, the Director's Office's move to the Judicial Center is a reality. The space is located in the renovated Historical Society Building near the Capitol. At present, the move to

the Judicial Center is scheduled for October 1, 1994. The plans for the move date back to 1985 when the Director's Office was asked to project the numbers of employees in the year 2010. Since then many hours have been spent studying floor plans and dealing with architects. The Director's Office and a new courtroom for disciplinary hearings will occupy approximately 10,000 square feet of space which includes space on three levels. The office space will be located on the ground and first floors of the building and the courtroom, a vestibule and an attorney conference room will be located on the second floor.

II. CASE LOAD AND STATISTICS

A. Statistics.

Tables I, II, III and IV below show complaint and case dispositions statistics in recent years. Supreme Court disciplines as well as private discipline patterns remain stable from previous years. Case aging statistics are within the framework for the last few years, with the exception of disbarment. As described below, two of the disbarment cases decided in 1993 were particularly complex, and required extensive investigation and the filing of supplementary petitions for discipline. These cases do not, however, represent the norm in terms of case aging. Other disbarment cases decided since the last report have been handled extremely expeditiously. Joseph Beach, Gerald Murphy, and Wayne Vander Vort each stipulated to disbarment within five months of the filing of the complaints.

Despite the relative stability in the number of complaints received for the last four years, the overall number of files open in the Director's Office continues to increase at a steady pace. The number of files open increased by approximately 100 between December 1991 and May 1992. Since that time, almost another 100 have been added. This increased number of open files

generally has translated, as predicted in past years, into a larger number of cases over one year old. The number of older cases, however, is still at approximately the approved target of 100 cases. Balancing the competing demands of moving the private discipline and discipline not warranted files through the system promptly as well as bringing to completion the number of files that are fully litigated is always difficult. Trying in addition to meet the other substantial and growing time demands of the Director's Office such as the advisory opinions, the overdraft program and probation causes some measure of concern. The Director's Office has recently hired an additional attorney, which will bring the total number of attorney staff to ten. It is anticipated that the addition of this attorney will help reduce the increased inventory of cases. It cannot realistically be expected, however, that the increased backlog of older cases will quickly be eliminated.

TABLE I
Supreme Court Dispositions and Reinstatements 1983-1993
Number of Lawyers

	Disbarment	Suspension	Probation	Censure & Reprimand	Dismissal	Reinst. Matters	Total
1983	4	4	0	3	2	2	15
1984	3	7	3	9	0	3	25
1985	4	15	13	10	3	3	48
1986	8	17	4	2	0	3	34
1987	5	18	7	4	0	5	39
1988	4	22	8	4	1	5	44
1989	5	19	8	4	2	2	40
1990	8	27	9	10	0	5	59
1991	8	14	10	6	2	6	46
1992	7	16	8	5	0	6	42
1993	5	16	12	3	1	11	48

TABLE II

	<u>12/88</u>	<u>12/90</u>	<u>12/91</u>	<u>12/92</u>	<u>12/93</u>	<u>5/31/94</u>
Total Open Files	358	462	405	507	548	612
Cases at Least One Year Old	39	56	42	60	76	118*
Complaints Received YTD	1,149	1,384	1,380	1,399	1,405	662
Files Closed YTD	1,180	1,417	1,437	1,297	1,364	598

* 17 Files are currently under advisement at the Supreme Court.

TABLE III

	Percentage of Files Closed					
	<u>1988</u>	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>
1. Total Dismissals	81%	79%	76%	78%	80%	78%
a. Summary Dismissals	41%	38%	38%	40%	39%	40%
b. DNW/DEC	32%	35%	32%	32%	37%	31%
c. DNW/DIR	8%	6%	6%	7%	4%	6%
2. Admonitions	9%	10%	9%	12%	10%	11%
3. Private Probation	2%	1%	2%	1%	2%	2%
4. Supreme Court Dispositions	7%	8%	11%	6%	6%	6%
a. Supreme Court Dismissal	1%	--	--	--	--	--
b. Supreme Court Reprimand	--	--	1%	1%	1%	--
c. Supreme Court Probation	1%	1%	1%	1%	1%	1%
d. Supreme Court Suspension	4%	5%	6%	3%	3%	3%
e. Supreme Court Disbarment	1%	2%	2%	1%	1%	2%

TABLE IV

Number of Months File Was Open at Disposition

	<u>1988</u>	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>
Discipline Not Warranted/ District Ethics Committee	4	4	4	4	4	4
Discipline Not Warranted/ Director	6	4	7	6	8	8
Admonition	9	8	8	8	7	9
Private Probation	10	13	10	8	12	12
Supreme Court Reprimand	20	16	11	14	22	19
Supreme Court Probation	11	13	14	11	18	15
Supreme Court Suspension	16	11	12	13	14	16
Supreme Court Disbarment	9	9	12	16	14	24

B. Minnesota Supreme Court Disciplinary Cases.

Attached at A. 5 is a table identifying those attorneys who have been publicly disciplined or reinstated to the practice of law after suspension or disbarment in 1993. Five Minnesota attorneys were disbarred for misappropriation and/or other serious offenses:

Gerald W. Murphy

Timothy E. Graham

Joseph W. Beach

Edward M. Cohen, Sr.

Harold W. E. Anderson

Misappropriation of funds figured prominently in four of the five disbarment cases this year. Seven of the sixteen attorneys suspended in 1993

had misappropriated funds. One of the more complex cases the Director's Office handled is that of Edward M. Cohen, Sr. Because of Cohen's efforts to impede the disciplinary process, and the time required to unravel the workings of multiple trust accounts, extensive investigation was required between the filing of the initial petition, filed in January 1992, and the supplementary petition filed in May 1993, to ascertain the facts. Cohen was disbarred for misappropriating more than \$290,000 in client funds, as well as committing numerous trust account violations, misrepresentations to clients and the Director's Office, forgery, and violation of court orders and obstruction of court processes. Following the disciplinary proceedings, Cohen pled guilty to one count of theft by swindle.

The disbarment of Wayne A. Vander Vort involved misappropriation of client and law firm funds totalling approximately \$222,000 over eight years. The misappropriation of client funds was accomplished by falsely billing clients for Vander Vort's personal expenses. The law firm funds were misappropriated by falsely billing Vander Vort's personal expenses to client files and later directing that the falsely billed expenses be written off to the firm.

Dishonesty was also prominent in the only disbarment case this year that did not involve misappropriation. Timothy E. Graham fabricated documents, gave false testimony, engaged in a pattern of submitting false evidence and fabricated documents, engaged in a pattern of conduct prejudicial to the administration of justice and failed to cooperate in the disciplinary proceedings. Much of his misconduct centered around the fabrication and backdating of documents in his personal bankruptcy, and his efforts to conceal his assets from his creditors. His dishonesty also permeated his law practice, and he on several occasions fabricated retainer letters in

response to disciplinary complaints lodged against him, and then used the same fabricated letters to sue for unearned attorneys fees. The BCA provided invaluable assistance in this case in its analysis of the fabricated documents, discovering that the documents were printed on paper manufactured after the date they were purportedly signed. Mr. Graham was subsequently tried and convicted of federal crimes arising out of the same facts.

There has been a significant increase in the number of reinstatement decisions and petitions in 1993 - 1994. Eleven reinstatement matters were decided by the Court in 1993. Seven petitions are currently pending.

III. NEW RULES, PROGRAMS AND RULE AMENDMENTS UNDER CONSIDERATION

A. New Rules.

Effective August 31, 1993, the Minnesota Supreme Court adopted amendments proposed by the Minnesota State Bar Association ("MSBA") to Rules 7.2 and 7.3. These amendments govern lawyer advertising. Rule 7.2 now requires lawyers to disclose whether in a contingent fee case the client will be liable for expenses regardless of outcome, if the lawyer intends to hold the client liable. The Rule also requires that the word "ADVERTISEMENT" appear in clear and conspicuous type at the beginning of a written solicitation to a prospective client. The Lawyers Board did not comment on the MSBA petition. Attached at A. 6-7 is a copy of the Court's order and amended rules.

B. Rule Amendments Under Consideration.

On March 10, 1994, the MSBA petitioned the Court for an amendment to the Rules of Professional Conduct which would explicitly regulate consensual lawyer-client sexual relationships. Such conduct has to date been regulated under the general conflict of interest rules (Rule 1.7(b)). The MSBA's proposed amendment, Rule 1.8(k), would not prohibit all such

relationships, but creates a rebuttable presumption that the lawyer's independent judgment is likely impaired, and hence the rule violated. The proposal specifically prohibits sexual relationships with clients who are financially or emotionally vulnerable.

The Lawyers Board also has filed a petition with the Court regarding lawyer-client sex. The Lawyers Board joins with the MSBA in the need for an explicit rule regulating lawyer-client sex, but voted to adopt a bright-line standard. The Board's proposed amendment to the Rules is a per se ban on lawyer-client sexual relationships unless the sexual relationship predated the establishment of the lawyer-client relationship. The petitions are scheduled for hearing by the Court on June 8, 1994. Attached at A. 8-9 are copies of the proposed amendments.

C. Supreme Court Advisory Committee Recommendations for Rule Changes.

The Supreme Court Advisory Committee has recommended a number of amendments to the Rules of Professional Conduct. The most significant recommendation is to establish, on a pilot basis, alternative programs to lawyer discipline, including mediation of minor complaints. The Committee agreed with the ABA's recommendation that the creation of additional remedies might provide greater consumer satisfaction with the disciplinary process and would allow disciplinary counsel more time to work on serious cases of misconduct. The Committee recommended that the mediation pilot program be conducted for a period of three years by three District Bar Associations to test the use of mediation for disputes involving a client and his or her attorney.

The Committee's other recommendation with respect to alternative programs is to require that fee arbitration, which is now voluntary, would be

mandatory for fee disputes under the statutory conciliation court limits (\$7500). The Committee found that currently, under the voluntary system, up to half of the arbitrations do not go forward because the attorney refuses to cooperate.

The Advisory Committee's recommendations with respect to alternative remedial programs will be presented to the MSBA at the June 1994 convention. If approved, the MSBA will likely petition the Court to amend the Rules of Professional Conduct this summer.

The Committee's recommendations for alternative remedial systems are included as amendments to Rule 6, Rules on Lawyers Professional Responsibility (RLPR). The Committee also recommended a number of minor amendments to Rules 7, 16 and 20, RLPR.

The Committee also reviewed the workings of the Director's Office and the Board and has made certain administrative recommendations. The Committee has recommended that the size of the Lawyers Board be reduced from 23 to 18 members, that the Executive Committee be reduced from 5 to 3 members and that it meet with the Director at least bi-monthly. The Board commented on these recommendations, stating that it believed that reducing the size of the Board and Executive Committee could place a strain on the volunteer members. The Committee also recommended that the Board meetings be opened to the public, which has already been implemented. Attached at A. 10-17 is Appendix 5 to the Advisory Committee Report, the Draft Model Amendments to the Minnesota Rules on Lawyers Professional Responsibility. The Court will consider the Advisory Committee's administrative recommendations once the MSBA has filed its petition regarding the remedial systems pilot project.

IV. DIRECTOR'S OFFICE.

A. Budget.

1. FY'94 Budget.

Projected actual expenditures for the fiscal year ending June 30, 1994, are estimated to be \$1,305,000. This will be approximately \$130,078 less than the original budgeted expenditures for the fiscal year.

The FY'94 budget included \$75,000 for data processing and \$20,000 for computer hardware. In November 1993, meetings resumed to move ahead on the computer project. It is unlikely that any funds will be spent this fiscal year. Consultants estimate that a new system could cost up to \$500,000. The unspent monies from FY'94 will be encumbered and added to funds for FY'95 for the computer project. \$120,000 of FY'94 unspent funds have been encumbered for dedication to the computer project.

The FY'94 budget includes salary savings as a result of the resignation of the First Assistant Director in October 1993. An Assistant Director was hired to fill the vacant position in December.

2. FY'95 Budget.

On July 1, 1993, the attorney registration fee increased by \$10.00. The Lawyers Professional Responsibility Board receives \$100.00 of the \$142.00 attorney registration fee. The FY'95 budget includes expenditures in the amount of \$1,803,871. The FY'95 budget includes a cost of living adjustment of 3.25% and a 3% performance increase. The FY'95 figures are high because of expenses to be incurred in the move to the Judicial Center.

Recommendations for changes to the discipline system made by the Advisory Committee may also have an as yet unknown effect on the budget.

B. Administration.

1. Computerization - Macintosh.

Word processing conversion to Macintosh computers went extremely well. The Director's Office obtained two additional Macintosh computers this year for a total of 19. The computers are networked which has proved useful for the entire staff.

2. Computerization - TCIS.

Work is progressing to replace the TCIS system currently in use for data processing of case related statistics and information. The Supreme Court Advisory Committee recommended that the Director's Office upgrade its data processing system to be better able to track, manage and analyze data. The TCIS system is burdensome and does not provide the statistical information required. The Director's Office is in the process of contracting with an outside consultant to conduct an analysis of needs and existing equipment.

C. Personnel.

Attached at A. 18 is the current Director's Office organizational chart. In June 1993, Maria Cleveland was hired as a part-time law clerk. Maria graduated from law school in May 1994, and moved out of state to seek employment. Samantha Juneau will start on May 31, 1994, as the new law clerk.

In October 1993, former First Assistant Director Thomas Vasaly left the Director's Office to join the staff of the Attorney General's Office. In October, Kenneth Jorgensen was promoted to the First Assistant Director position.

In December 1993, Henry C. Granison was hired to fill the vacant Assistant Director position.

The FY'94 budget included funds for hiring an Assistant Director in January 1994. Because Mr. Granison started in December, hiring of the

additional attorney was temporarily postponed to more easily integrate and train new employees. Craig Klausing was hired recently for the new Assistant Director position and will begin work June 13, 1994.

D. Trusteeships.

The Director's Office has previously been appointed trustee of client files of attorneys who are unable to continue handling client matters. Upon appointment, the Director's Office takes possession of the client files, notifies clients and returns or destroys files at the direction of the client.

There were no new trusteeships last year. This year client files of James Skonnord were destroyed. Trusteeship files remaining in the possession of the Director's Office (and projected destruction dates) include:

<u>Attorney Name</u>	<u>Destruction Date</u>	<u># of Files</u>
William Ladd	June 5, 1994	80
James Hunter	July 12, 1994	42
William Peters	June 26, 1994	27
Steven Heikens	July 11, 1994	115
Roger Nurnberger	February 6, 1995	464
Rodney French	February 6, 1995	96

The Director's Office continues to incur storage space costs for storing these files.

E. Probation.

In 1993, 100 attorneys were on probation during some portion of the year, a 15 percent increase over 1992. Forty-eight were public probations, the remaining 52 were private stipulations. Almost half of the 37 probation files opened during 1993 included neglect and non-communication. These probations are almost always supervised and generally require the probationer to submit a written plan outlining office procedures he/she has initiated to improve office practice and file management.

Approximately 60 attorneys served as volunteer supervisors during 1993. Supervisors generally practice in the same geographic area, have some familiarity with the probationer's type of practice but do not frequently have cases adverse to that attorney. Supervisors are usually nominated by the attorney they monitor and must be approved by the Director's Office.

The monitoring of books and records continues to expand. Fourteen new probation files in 1993 involved inadequate trust account books and records. The Director's Office monitors an increasing number of books and records probations by requiring submission of monthly reconciliations and through periodic audits of trust account books and records.

The probation department continues to hold an annual meeting for supervisors in connection with the annual Professional Responsibility seminar.

1. File Totals:

Total Probation files as of 1/1/93	63
Probation files opened in 1993	37
Probation files closed in 1993	22
Total probation files as of 1/1/94	78

2. 100 Attorneys were on probation during some portion of 1993:

a. 48 Court-ordered probations (23 of whom were attorneys reinstated after suspended from practice)
28 supervised (16 after suspension)
20 unsupervised (7 after suspension)

b. 52 stipulated private probations
32 supervised
20 unsupervised

3. Files involving:

Client-Related Violations	63
Non-Client-Related Violations	37

4. Areas of Misconduct:*

Neglect/Non-commun.	52	Conflict of Interest	4
Taxes	13	Criminal Conduct	7
Books and Records	29	Failure to Return	
Misrepresentation	6	Property/File	2
Non-cooperation	9	Unauthorized Practice	4
Misappropriation	11	Illegal fees	1
Other	13		

8 files involved chemical dependency (abuse of alcohol/drugs);
5 files involved psychological disorder

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

5. Closed in 1993: 22

Successfully completed probations 19
Revoked probations 3

6. Probations extended in 1993: 1

7. Time by Probation Department Staff (hours per week):

5.0 Attorney
20.0 Legal Assistant

F. Advisory Opinions.

Telephone advisory opinions concerning questions of professional responsibility continue to be available from the Director's Office to all licensed Minnesota attorneys and judges. The number of telephone opinions issued in recent years has continued to increase:

1989	948
1990	1130
1991	1083
1992	1201
1993	1410

Advisory opinions issued by the Director's Office are the personal opinion of the attorneys issuing the opinions and are not binding upon the Lawyers

Board or the Supreme Court. In 1993, the Director's Office expended 381 hours of attorney time in issuing advisory opinions. This compares with 313 hours in 1992. The most frequent areas of inquiry in 1993 were conflict of interest and trust accounts.

G. Judgments and Collections.

Costs judgments entered in 1993 increased moderately by about \$6,400 (23%) from judgments entered in 1992. Costs collected in 1993 increased about \$5,900 from those collected in 1992, an increase of 30%. Approximately 50% of the judgments entered in 1993 have been collected to date.

The Director's Office continued to execute upon funds at financial institutions and upon earnings. In 1993, \$672.58 was collected through the summary execution process.

1. Cost Judgments Entered in 1993 (36 attorneys)	\$ 35,245.42
2. Total Costs Collected in 1993	26,135.45
3. Costs Collected in 1993 for Dispositions prior to 1993, including interest (9 attorneys)	9,265.06
4. Cost Judgments Entered in 1994 (4 attorneys)	3,500.75
5. Costs Collected in 1994	3,341.66
6. Unpaid Judgments as of January 1, 1994	116,284.00
7. 1993 National Discipline Data Bank Reports	53

H. Professional Corporations.

Under the Minnesota Professional Corporations Act, Minn. Stat. § 319A.01 to 319A.22, a professional corporation engaged in the practice of law must file an annual report, accompanied by a filing fee, with the Board. The Professional Corporations Act contains limitations on the structure and operation of professional corporations.

The Director's Office has monitored the reporting requirements of the statute since 1973. Annual reports 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. This year the report form was updated to reflect changes in the law which permit Limited Liability Companies to act as professional corporations.

The following are the income statistics for the professional corporation department as of May 10, 1994:

771	@	\$25.00	\$19,275.00
61	@	100.00	<u>6,100.00</u>
			<u>25,375.00</u>
10	for	1,450.00*	<u>1,450.00</u>
			<u>26,825.00</u>

*Funds collected for fees owed for 1992 and prior years.

Total Attorney Hours:	20
Total Non-attorney Hours:	139

The professional corporation department is staffed by a Senior Assistant Director, legal assistant, and file clerk. The professional corporation roster, statistical data, and regular notice letters are retained in a computer to facilitate efficient processing.

I. Overdraft Notification.

Since 1990, banks have reported overdrafts on lawyer trust accounts to the Director's Office. The number of overdraft reports fell from 185 in 1992 to 149 in 1993.

1. Terminated Inquiries.

During 1993, the Director's Office received 149 overdraft notices (ODN's) and terminated 131 overdraft inquiries without initiating a disciplinary investigation.

If the attorney's response and documentation adequately explain the overdraft, the inquiry is terminated and, if necessary, improvements in trust account practices are recommended. In 55 of the terminated overdrafts, changes or improvements were recommended. Statistics for 1993 terminated inquiries and instruction letters are set forth below:

1. Overdraft Causes.

Late deposit	34
Bank error	25
Service or check charges	41
Deposit to wrong account	7
Mathematical/clerical error	6
Improper/lacking endorsements	2
Check written in error on TA	2
Third party check bounced	6
Bank hold on funds drawn	1
Reporting error	7

2. Disciplinary File Openings.

If the attorney's response does not adequately explain the overdraft or significant problems are identified, a disciplinary investigation is commenced and the attorney is notified. Statistics for trust account inquiries which resulted in 1993 disciplinary file openings are set forth below:

<u>Reason for Investigation</u>	
Shortages	6
Commingling	2
Response fails to explain ODN	1
Inadequate books and records	1
Other	1
Total	11

The trust account overdraft program was extremely successful in two recent disbarment cases involving misappropriation of client funds. See *In re Cohen*, 503 N.W.2d 771 (Minn. 1993) and *In re Swerine*, 513 N.W.2d 463 (Minn. 1994). In *Cohen*, the overdraft notice enabled the Director's Office to unravel a complex misappropriation case involving multiple trust accounts. In *Swerine*, the overdraft notice initiated an investigation into theft of client funds within days of the theft occurring and caused the Director's Office to become aware of the thefts before the affected clients had any reason to suspect there was a problem.

3. Time Requirements.

Set forth below are the 1992 and 1993 staff time requirements to administer the overdraft notification program:

	<u>1/92-1/93</u>	<u>1/93-1/94</u>
Attorney	215.00 hrs	173.00 hrs
Legal assistant and other staff	402.75 hrs	243.00 hrs
Total	617.75 hrs	416.00 hrs

J. Complainant Appeals.

During 1993, the Director's Office received 255 complainant appeals, compared to 212 such appeals in 1992. This is approximately 21 percent of files closed. Board members made the following determinations:

		<u>%</u>
Approve Director's disposition	224	87
Direct further investigation	26	10
Instruct Director to issue an admonition	0	0
Instruct Director to issue charges	7	3

A total of 40 clerical hours were spent in 1993 processing the appeal files, as well as an unrecorded amount of attorney time.

K. Disclosure.

1. Department Function.

The disclosure department responds to requests for attorney disciplinary records.

2. Source and Number of Requests for Disclosure.
Calendar Year 1993.

	<u># of Requests</u>	<u># of Attorneys</u>	<u>Discipline Imposed</u>	<u>Matters Pending</u>
A. National Conference of Bar Examiners	102	102	3	0
B. Individual Attorneys	6	6	0	0
C. Local Referral Services				
1. MSBA	33	280	1	0
2. RCBA	47	136	0	1
D. Governor's Office	9	29	2	1
E. Other State Discipline Counsels/State Bars or Federal Jurisdiction	121	121	2	0
F. F.B.I.	12	22	0	0
G. MSBA: Specialist Certification Program	7	76	4	2
H. Miscellaneous Requests	8	70	0	0
TOTAL	345	842	12	4

V. DISTRICT ETHICS COMMITTEES.

The DEC's 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 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 when any questions or problems might arise in the course of an investigation.

The volume of files referred to the DEC's decreased in 1993 but appears to be significantly increasing in 1994. The overall monthly average number of files at the DEC's for 1991 was 153. For 1992 it was 190. For 1993 it was 171. The year-to-date average volume for 1994 is 200 through May 31, 1994.

Prior to 1994, the existing data processing system only enabled the Director to monitor the timeliness of DEC investigations by tracking the average file age for investigations still pending in the DEC. The overall average file age for pending matters in the DEC's for May 1994 was 1.7 months, with the Hennepin DEC at 2.2 months and the Ramsey DEC at 1.6 months. This is consistent with DEC performance in past years.

The Director's Office recently obtained new software which facilitates the keeping of additional statistics reflecting DEC performance. In 1994, in addition to tracking the average age of pending investigations, the Director began tracking the average age for completed investigations by the DEC's. For completed DEC investigations in May 1994 the overall average was 3.1 months, with the Hennepin DEC at 2.9 months and the Ramsey DEC at 3.6 months. It should be emphasized that, while these averages are higher than averages traditionally reported, it does not reflect a significant change in the length of DEC investigations, but rather is directly attributable to the new method of reviewing DEC performance based upon completed investigations rather than from the perspective of pending investigations. DEC reports of pending and completed investigations are included at A. 19-20.

Credit must continue to be given to the individual committees and volunteers who have worked hard to maintain and improve the efficiency of the system. Without their efforts, Minnesota would not have been able to

achieve or maintain its reputation for being in the forefront of attorney discipline.

VI. FY'95 GOALS AND OBJECTIVES.

The MSBA, the Board, the Director's Office and the DEC's will have a tremendous task ahead in FY'95 if the Advisory Committee's recommendations to implement new remedial systems are to occur. Work at the MSBA in conjunction with assistance and input from the Director's Office has already commenced to design a mediation system that can efficiently address the concerns the Advisory Committee raised with respect to consumer satisfaction with the lawyer discipline system. To design a cost-effective and efficient system is paramount. The resources of the Director's Office are already stretched to accommodate existing programs. It is clear from the Advisory Committee's report that implementation of the proposed programs on a pilot basis is in part to test the effectiveness of the alternative systems and the impact on volunteer resources.

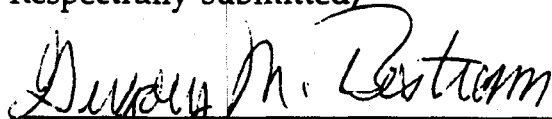
Educational efforts will continue to be an important goal. The MSBA is considering whether to petition the Court to require a specific number of continuing legal education hours each reporting period devoted to ethical issues. Should that occur, the Director's Office would expect to work with the bar in developing sufficient programs in terms of number and substantive content to accomplish this goal. The Advisory Committee recommended that the Director's Office continue to provide advisory opinions to the bench and bar, and these efforts will continue. The number of hours spent on the provision of this service continues to increase; however, and some accommodation eventually may have to be made to preserve the resources of the Director's Office to accomplish its primary purpose.

The Advisory Committee's Recommendation No. 31 reflected the Committee's recognition of the inadequacy of the Director's Office's current data processing equipment for its needs and the need to upgrade the facilities "to ensure that the Office has the capabilities to adequately track and otherwise manage case load information." Work on replacement of the TCIS computer system is back on track in FY'94, and resources permitting, it will be moved forward in FY'95.

A smooth transition to the new location at the Judicial Building is among the first tasks to be accomplished in FY'95. While much work has been done, more remains. The Office is working closely with architects, communications experts, construction engineers and others to ensure that the move will be successful.

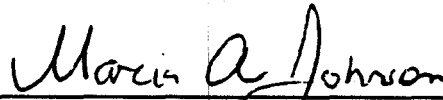
Dated: June 10, 1994.

Respectfully submitted,



GREGORY M. BISTRAM
CHAIR, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

and



MARCIA A. JOHNSON
DIRECTOR OF THE OFFICE OF
LAWYERS PROFESSIONAL
RESPONSIBILITY

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OPINION 17: WHO GETS THE TOASTER?

BY MARCIA A. JOHNSON

It is the age of rebates: it is the time of perks and incentives. Companies need a gimmick. Even companies that sell services to lawyers. And the perks aren't just toasters these days. They start with coffee makers, Walkman radios, or tickets to the Guthrie and they progress in value to color TVs, compact disc players, and airline tickets, as well as hard cold cash.

Imagine the following scenario: a managing partner of a medium-sized law firm is called in to resolve a dispute between two secretaries that has quickly escalated. The dispute is this: who is the owner of a free vacation in the Caribbean, offered by a local court reporting firm in exchange for scheduling a certain number of depositions?

One secretary has been responsible for scheduling the depositions in a large piece of litigation at the firm. She has earned almost enough credit with the court reporting firm to qualify for the vacation trip, when she goes on maternity leave. She requests her replacement to continue to schedule the depositions with the same firm. The replacement secretary does so, but also takes the free tickets.

The lawyer is temporarily nonplused ...

Who is the rightful owner of the free vacation? Secretary 1, secretary 2, the lawyer who conducted the depositions, or the client, who is ultimately responsible for paying for the court reporting services?

The answer is, the client. But there are other questions that must be answered besides that of ownership. What are a lawyer's ethical obligations with respect to the acceptance by the lawyer, or a non-lawyer employee of the firm, of rebates, gratuities, or incentives for simply scheduling services for which the client is expected to pay?

The Lawyers Board adopted Opinion 17, "Accepting Gratuities from Court Reporting Services and Other Similar Services," at its June 18, 1993 meeting. The opinion, reprinted below, clarifies the Board's position with respect to a lawyer's ethical obligations regarding gratuities from service providers.

The rationale of the opinion is self-evident. If a lawyer receives something of value, for ordering a service for which the client must pay, the lawyer is really receiving additional compensation to which he or she is not entitled, absent client con-

"if a lawyer accepts a gratuity from anyone without his client's knowledge and consent ... the gratuity really belongs to the client."

OPINION NO. 17

ACCEPTING GRATUITIES FROM COURT REPORTING SERVICES AND OTHER SIMILAR SERVICES

It is improper for a lawyer to accept, or to permit any nonlawyer employee to accept, a gratuity offered by a court reporting service or other service for which a client is expected to pay unless the client consents after consultation. However, a lawyer may accept nominal gifts, such as pens, coffee mugs, and other similar advertising-type gifts without consent of the client.

See Rules 1.4, 1.5(a), 1.8(f)(1), and 5.3, Minnesota Rules of Professional Conduct (MRPC). See also definition of "consultation" in the MRPC terminology section.

sent. ABA Informal Opinion 278 (undated) decided that "if a lawyer accepts a gratuity from anyone without his client's knowledge and consent ... the gratuity really belongs to the client."

The fact that it is not a lawyer, but a nonlawyer employee of the firm who may have received the benefit does not relieve the attorney of his or her professional obligations. While nonlawyers are not subject to professional discipline, the lawyer for whom they work is responsible for ensuring that their conduct is compatible with the professional obligations that apply to the lawyer. The lawyer may herself be

guilty of a violation of the Rules of Professional Conduct if she knows of the conduct, ratifies it, or having direct supervisory responsibility over the nonlawyer and knowing of the conduct at a time when the conduct can be avoided or remedial measures can be taken, fails to do so.

Attorneys are not prohibited from accepting gifts and awards from court reporting firms, or other services for which a client is expected to pay, so long as the client is consulted and consents. What, then, does the client need to know about such gifts? "Consultation" is defined by the MRPC as "information reasonably sufficient to permit the client to appreciate the significance of the matter in question." ... the nature of the gift or incentive, whether the services could be obtained for less money if the gifts or incentives were refused, and whether the cost of the services is comparable to that charged by other providers of like services in the area that does not offer such a gratuity or incentive.

No client consent is necessary for those gifts that are truly nominal in value. But what is nominal? Calendars with the company logo? Sure. Popcorn? Well, it may not be an "advertising-type" gift, but surely there can be an exception for popcorn. Gift certificates to Dayton's? Cash bonuses of up to \$100? Trips to the Bahamas? ... The safest course is to consult your client if in doubt. □

NOTES

1. See also Lawyers Board Opinion No. 17, "Nonlawyers must be supervised by an attorney who is responsible for their work. If the attorney-supervisor permits violations of these guidelines, he shall be guilty of professional misconduct."

MARCIA A. JOHNSON is the director of the Office of Lawyers Professional Responsibility. She previously worked



for the Resolution Trust Corporation, Professional Liability Section, and as a litigation associate with Oppenheimer, Wolff & Donnelly.

LAWYERS PROFESSIONAL RESPONSIBILITY '93
Annual Seminar

Friday, October 29, 1993

Sheraton Inn Midway
I-94 and Hamline
St. Paul, MN 55104
(612) 642-1234

PROGRAM SCHEDULE

- 8:30 - 9:00 Coffee and Registration
- 9:00 - 9:30 Opening Remarks - The Year in Review
 Marcia A. Johnson, Director
 Office of Lawyers Professional Responsibility
- 9:30 - 10:15 Report and Recommendations of the Minnesota Supreme
 Court Advisory Committee on Lawyer Discipline
 Janet M. Dolan, Co-Chairperson
 Robert F. Henson, Co-Chairperson
- 10:15 - 10:30 **Break**
- 10:30 - 11:15 Minnesota Trust Account Overdraft Notification Program: How
 It Works, What Has Happened
 Kenneth L. Jorgensen, First Assistant Director
 Office of Lawyers Professional Responsibility
- 11:15 - 12:15 Termination of Representation: When It Happens, What To Do
 Martin A. Cole, Senior Assistant Director
 Karen A. Risku, Senior Assistant Director
 Office of Lawyers Professional Responsibility
- 12:15 - 1:30 **Lunch** (provided)

- 1:30 - 2:15 **Mediation and Lawyer Discipline: The New York Experience**
 Hal R. Lieberman, Chief Counsel
 First Judicial Department
 Departmental Disciplinary Committee
- 2:15 - 3:15 **The Mediation Process: A Demonstration and Discussion**
 Videotaped Mediation presented by:
 Hal Lieberman, Chief Counsel
 First Judicial Department
 Departmental Disciplinary Committee
- Carol Liebman, Clinical Professor of Law
 Columbia Law School, Professional Mediator
- Marsha Sims
 Partner, Weil Gotshal & Manges
 Past Chairperson, New York City Bar Association
 Mediation Project
- 3:15 - 3:30 **Break**
- 3:30 - 4:30 **District Ethics Committee Workshop**
 Patrick R. Burns, Senior Assistant Director
 Office of Lawyers Professional Responsibility



1993 SUPREME COURT DISPOSITIONS

DISBARMENTS (24 FILES - 5 ATTORNEYS)

HAROLD W. MURPHY - 1
TIMOTHY E. GRAHAM - 9
JOSEPH W. BEACH - 1
EDWARD M. COHEN - 10
HAROLD W.E. ANDERSON - 3

REPRIMANDS (5 FILES - 3 ATTORNEYS)

PATRICK W. HAWKINS - 3
DAVID M. LAWSON - 1
LOUIS B. OBERHAUSER - 1

PROBATION (19 FILES - 12 ATTORNEYS)
ATTORNEYS)

JAY A. JOYNER - 2
JANE E. BROOKS - 1
RICHARD E. LINNEROOTH - 1
ROBERT J. BRENNER - 5
RICHARD W. WEST - 1
THOMAS M. BRUDVIG - 3
STEWART R. PERRY - 1
DOUGLAS J. CARNEY - 1
JOHN R. WYLDE, JR. - 1
BJORN J. ULSTAD - 1
RICHARD J. HAEFELE - 1
NORMAN K. GURSTEL - 1

REINSTATEMENT DENIED (2 FILES - 2 ATTORNEYS)

DANIEL L. DOBSON - 1
PATRICK J. FLANERY - 1

REINSTATEMENT PETITION

WITHDRAWN (1 FILE - 1 ATTORNEY)

ELI C. LEVENSTEIN - 1

SUSPENSIONS (38 FILES - 16 ATTORNEYS)

WALTER GORDON PERRY - 1
ROBERT E. MATHIAS - 1
SCOTT DAVID FRIDE - 4
MICHAEL G. SINGER - 1
DONALD R. RORVIG - 1
ROBERT J. HAMPTON - 1
TIMOTHY D. CLEMENTS - 4
STEVEN J. KINNUNEN - 3
WILLIAM D. STOCKMAN - 2
LYNN J. FIRESTONE - 1
DAVID T. ERICKSON - 2
BRUCE E. ERICKSON - 8
JOSEPH ADAM FIELD - 1
STEVEN PATROW - 4
RICHARD W. COPELAND - 4

REINSTATEMENT (10 FILES - 9 ATTORNEYS)

JAMES H. SCHAEFER - 1
SHELDEN M. VIE - 1
LEWIS S. BERNSTEIN - 1
KEVIN P. SULLIVAN - 2
WALLACE F. GUSTAFSON - 1
CHESTER C. GRAHAM - 1
JAY T. SALMEN - 1
MICHAEL L. KIEFER - 1
WILLIAM R. NORDSTROM - 1

DISABILITY (1 FILE - 1 ATTORNEY)

EDWARD B. DICKSON - 1

SUP. CT. DISMISSAL (1 FILE - 1 ATTORNEY)

PANEL FILE NO. 92-33 - 1

STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

RECEIVED

SEP 21 1993

LAWYERS PROF. RESP. OFFICE

PROMULGATION OF AMENDMENTS TO
THE RULES OF PROFESSIONAL CONDUCT

ORDER

WHEREAS, the Minnesota State Bar Association filed a petition with this Court that recommended amendments to Rules 7.2 and 7.3 of the Rules of Professional Conduct, and

WHEREAS, the Supreme Court held a hearing on the proposed amendments on April 12, 1993, and

WHEREAS, the Supreme Court has reviewed the recommendations and is fully advised in the premises.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The attached amendments, amending Rules 7.2 and 7.3 of the Rules of Professional Conduct be, and the same hereby are, prescribed and promulgated for the regulation of the legal profession in the State of Minnesota.

2. The amendments are effective this date.

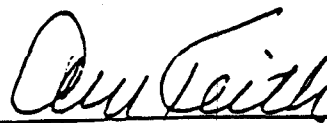
DATED: August 31, 1993

BY THE COURT:

OFFICE OF
APPELLATE COURTS

SEP 1 1993

FILED


A.M. Keith
Chief Justice

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

August 31, 1993

Rule 7.2 Advertising and Written Communication

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, ~~such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television,~~ or through written communication.

(e) Advertisements and written communications indicating that the charging of a fee is contingent on outcome must disclose that the client will be liable for expenses regardless of outcome, if the lawyer so intends to hold the client liable.

(f) The word "ADVERTISEMENT" must appear clearly and conspicuously at the beginning of any written solicitation to a prospective client with whom the lawyer has no family or prior professional relationship and who may be in need of specific legal services because of a condition or occurrence that is known to the soliciting lawyer.

~~(e)~~(g) Every lawyer associated with or employed by a law firm which causes or makes a communication in violation of this Rule may be subject to discipline for failure to make reasonable remedial efforts to bring the communication into compliance with this Rule.

Rule 7.3 DirectIn-Person and Telephone Contact with Prospective Clients
[Change only to title of rule].

MSBA Proposed Rule

Rule 1.8(k)

- (1) A lawyer shall not:
 - (A) Have sexual relations with a current client in situations in which the client is emotionally or financially vulnerable; or
 - (B) Represent a client or continue representing a client with whom the lawyer has engaged in sexual relations if the lawyer's or the client's independent judgment is likely to be impaired thereby.
- (2) For the purposes of this paragraph:
 - (A) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing such person to touch intimate parts of the lawyer.
 - (B) If the client is an organization, any individual who oversees and has decision-making authority regarding the representation shall be deemed to be the client.
 - (C) This rule does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client.
- (3) In any disciplinary proceedings involving an alleged violation of these rules, a lawyer who engages in sexual relations with a client will be presumed to violate Rule 1.8(k) paragraph (A)(2). A lawyer who engages in sexual relations with a client shall have both the burden of production and the burden of persuasion that Rule 1.8(k) paragraph (A)(2) is not violated.
- (4) If a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation and whether to charge any violation based on the allegation, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.
- (5) Rule 1.8(k) shall not apply to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

LPRB Proposed Rule

Rule 1.8 Conflict of Interest: Prohibited Transactions

Rule 1.8(k) A lawyer shall not have sexual relations with a current client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced or after it ended. For purposes of this paragraph:

- (1) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.
- (2) If the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client. In-house attorneys while representing governmental or corporate entities are governed by Rule 1.7(b) rather than by this rule with respect to sexual relations with other employees of the entity they represent.
- (3) This paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client.
- (4) If a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation and whether to charge any violation based on the allegation, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.

APPENDIX 5

DRAFT MODEL AMENDMENTS TO MINNESOTA RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

APPENDIX 5

DRAFT MODEL AMENDMENTS TO
MINNESOTA RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

RULE 4. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD.

(a) Composition. The Board shall consist of:

(1) A Chair appointed by this Court for such time as it designates and serving at the pleasure of this Court but not more than six years as Chair; and

(2) ~~Ten Thirteen~~ lawyers having their principal office in this state, ~~five six~~ of whom the Minnesota State Bar Association may nominate, and ~~seven nine~~ nonlawyers resident in this State, all appointed by this Court to three-year terms except that shorter terms shall be used where necessary to assure that as nearly as may be one-third of all terms expire each February 1. No person may serve more than two three-year terms, in addition to any additional shorter term for which the person was originally appointed and any period served as Chair. To the extent possible, members shall be geographically representative of the state and lawyer members shall reflect a broad cross section of areas of practice.

(c) Duties. The Board shall have general supervisory authority over the administration of the Office of Lawyers Professional Responsibility and these Rules, and may, from time to time, issue opinions on questions of professional conduct. The Board shall prepare and submit to this Court an annual report covering the operation of the lawyer discipline and disability system. The Board may elect a Vice-Chair and specify the Vice-Chair's duties. Board meetings are open to the public, except the Board may go into closed session not open to the public to discuss matters protected by Rule 20 or for other good cause.

(d) Executive Committee. The Executive Committee, consisting of the Chair, and one lawyer and one nonlawyer ~~two lawyers and two nonlawyers~~ designated annually by the Chair, shall be responsible for carrying out the duties set forth in these Rules and ~~for the general supervision of the Office of Lawyers Professional Responsibility.~~ The Executive Committee shall meet with the Director at least once every two months to oversee policy implementation, monitor operations, and advise the Director. The Executive Committee shall act on behalf of the Board between Board meetings. If requested by the Executive Committee, it shall have the assistance of the State Court Administrator's office in carrying out its responsibilities. Members shall have served at least one year as a member of the Board prior to appointment to the Executive Committee. Members shall not be assigned to Panels during their terms on the Executive Committee.

RULE 6. COMPLAINTS

[NEW:]

(d) **Opportunity to respond to statements.** The District Committee or the Director's Office shall afford the complainant an opportunity to reply to the lawyer's response to the complaint.

[NEW:]

RULE 6X. PILOT PROGRAM FOR COMPLAINTS AGAINST LAWYERS IN _____, _____, AND _____ BAR ASSOCIATION DISTRICTS

(a) **Scope of pilot program.** This rule, rather than Rule 6(b), shall apply from _____ through _____ to the handling of any complaint against a lawyer whose principal office is located in the _____ Bar Association District (_____ County), the _____ Bar Association District (_____ County), or the _____ Bar Association District (_____ County), or _____ County).

(b) **Submission; Referral.** If a complaint of a lawyer's alleged unprofessional conduct is submitted to a District Committee, the District Chair promptly shall forward it to the Director. If a complaint is submitted or forwarded to the Director, the Director shall either:

(1) Refer it to the District Committee of the district where the lawyer's principal office is located or in exceptional circumstances to such other District Committee as the Director reasonably selects with a direction that it be investigated;

(2) Refer it to the District Committee, or to a volunteer professional mediator, with a direction that it be mediated;

(3) Investigate it without referral; or

(4) Determine that neither discipline nor mediation is warranted.

(c) **District Committee Investigation.** If the Director refers the complaint to a District Committee with a direction that it be investigated, the complaint shall be investigated as provided in Rule 7. However, if the investigator and the District Chair or District Chair's designee determine that the complaint should be mediated, they shall promptly submit a report to the Director explaining the reasons for the determination. If the Director agrees with the determination, the complaint may be mediated under paragraph (d). If the Director does not agree, the Director shall again refer the complaint for investigation or investigate it without referral.

(d) **Mediation.** If the Director refers the complaint to a District Committee for mediation, the District Chair may mediate or assign mediation of the complaint to one or more of the Committee's members. If a mediator determines that the complaint should be investigated, the mediator shall promptly submit a report to the Director explaining the reasons for the determination. Thereupon the Director shall decide whether to

refer the complaint for investigation, investigate it without referral, or again refer it for mediation. If the complaint is mediated:

(1) The mediation shall be governed by the Minnesota Civil Mediation Act;

(2) A mediated settlement agreement may provide for any resolution including participation in or attendance at continuing legal education or other courses, activities, or programs;

(3) If a mediated settlement agreement is reached, the mediator shall promptly forward a copy to the Director;

(4) If no mediated settlement agreement is reached, the mediator at the conclusion of the mediation shall promptly forward to the Director a report on why no mediated settlement agreement was reached;

(5) The mediation shall be completed and the settlement agreement or report forwarded promptly and, in any event within 45 days after the mediator received the complaint, unless good cause exists. If the settlement agreement or report is not forwarded within 45 days, the mediator within that time shall notify the Director of the reasons for the delay;

(6) If the complainant and the lawyer complete the mediation and the facts do not warrant public discipline, the Director shall determine that discipline is not warranted and, after the applicable time period, expunge the records of the matter under Rule 20(d). If additional allegations concerning the lawyer come to the Director's attention before the file is expunged, the Director may reopen the file and investigate the complaint. If either the complainant or the lawyer does not participate in or complete the mediation, the Director shall determine whether to investigate or dismiss the complaint; and

(7) No communication or document, including worknotes, made or used in the course of or because of mediation may be used against the lawyer in any disciplinary proceeding. A communication or document otherwise not privileged does not become privileged because of this rule.

(e) **District Fee Arbitration.** Regardless of whether a complaint is investigated or mediated, the Director may advise the complainant and the lawyer of the availability of fee arbitration and may send a copy of the complaint to the District Fee Arbitration Committee. Upon receipt of a complaint, either from the Director's Office or directly from a complainant, the District Fee Arbitration Committee shall contact the complainant to determine if the complainant desires to have the fee arbitrated. If the complainant desires to have the fee arbitrated, it shall be arbitrated, except that the lawyer may decline arbitration if the fee claimed exceeds the maximum amount specified by law for conciliation court jurisdiction.

(f) **Report on Pilot Program.** On or before _____, 19____, the Director shall report to the Court on the operation of this pilot program and shall make appropriate recommendations.

RULE 7. DISTRICT COMMITTEE INVESTIGATION

(d) Disposition.

(1) Determination Discipline Not Warranted. If, in a matter where there has been a complaint, the Director concludes that discipline is not warranted, the Director shall so notify the lawyer involved, the complainant, and the Chair of the District Committee, if any, that has considered the complaint. The notification shall:

- (i) ~~May~~ Set forth ~~an~~ a brief explanation of the Director's conclusion;
- (ii) ~~Shall~~ Set forth the complainant's identity and the complaint's substance; and
- (iii) ~~Shall~~ Inform the complainant of the right to appeal under subdivision (e).

(e) **Review by Lawyers Board.** If the complainant is not satisfied with the Director's disposition under Rule 8(d)(1), (2) or (3), the complainant may appeal the matter by notifying the Director in writing within fourteen days. The Director shall notify the lawyer of the appeal and assign the matter by rotation to a board member, other than an Executive Committee member, appointed by the Chair. The reviewing Board member may:

- (1) approve the Director's disposition; or
- (2) direct that further investigation be undertaken;

or

(3) if a district ethics committee recommended discipline, but the Director determined that discipline is not warranted, the Board member may instruct the Director to issue an admonition; or

(4) in any case that has been investigated, if the Board member concludes that public discipline is warranted, the Board member may instruct the Director to issue charges of unprofessional conduct for submission to a Panel other than the Board member's own.

The reviewing Board member shall set forth an explanation of the Board member's action. A summary dismissal by the Director under Rule 8(b) shall be final and may not be appealed to a Board member for review under this section.

RULE 9. PANEL PROCEEDINGS

(i) **Procedure at Panel Hearing.** Unless the Panel for cause otherwise permits, the Panel hearing shall proceed as follows:

- (1) The Chair shall explain that the hearing's purpose is to determine whether there is probable cause to believe that public discipline is warranted on each charge, and that the Panel will terminate the hearing on any charge whenever

it is satisfied that there is or is not such probable cause (or, if an admonition has been issued under Rule 8(d)(2) or 8(e), that the hearing's purpose is to determine whether the panel should affirm the admonition on the ground that it is supported by clear and convincing evidence, should reverse the admonition, or, if there is probable cause to believe that public discipline is warranted, should instruct the Director to file a petition for disciplinary action in this Court);

(2) The Director shall briefly summarize the matters admitted by the parties, the matters remaining for resolution, and the proof which the Director proposes to offer thereon;

(3) The lawyer may respond to the Director's remarks;

(4) The parties shall introduce their evidence in conformity with the Rules of Evidence except that affidavits and depositions are admissible in lieu of testimony;

(5) The parties may present oral arguments; and

(6) The complainant may be present for all parts of the hearing related to the complainant's complaint except when excluded for good cause; and

(7) The Panel shall either recess to deliberate or take the matter under advisement.

RULE 16. TEMPORARY SUSPENSION PENDING DISCIPLINARY PROCEEDINGS

(a) **Petition for Temporary Suspension.** In any case where the Director files or has filed a petition under Rule 12, if it appears that a continuation of the lawyer's authority to practice law pending final determination of the disciplinary proceeding poses a substantial threat of serious harm may result in risk of injury to the public, the Director may file with this Court an original and seven copies of a petition for suspension of the lawyer pending final determination of the disciplinary proceeding. The petition shall set forth facts as may constitute grounds for the suspension and may be supported by a transcript of evidence taken by a Panel, court records, documents or affidavits.

(d) **Hearing; Disposition.** If this Court after hearing finds a continuation of the lawyer's authority to practice law poses a substantial threat of serious harm may result in risk of injury to the public, it may enter an order suspending the lawyer pending final determination of disciplinary proceedings.

RULE 20. CONFIDENTIALITY; EXPUNCTION

(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:

(1) As between the Committees, Board and Director in furtherance of their duties;

(2) ~~In~~ After probable cause has been determined under Rule 9(j)(ii) or proceedings before a referee or this Court have been commenced under these Rules;

(3) As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice or seeks to practice;

(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.

(5) If the complainant is, or at the time of the actions complained of was, the lawyer's client, the lawyer shall furnish to the complainant copies of the lawyer's written responses to investigation requests by the Director and District Ethics Committee, except that insofar as a response does not relate to the client's complaint or involves information as to which another client has a privilege that portions may be deleted.

(6) Where permitted by this Court; or

(7) Where required or permitted by these Rules.

(8) 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.

(9) As between the Director and the Client Security Board in furtherance of their duties to investigate and consider claims of client loss allegedly caused by the intentional dishonesty of a lawyer.

(b) **Special Matters.** The following may be disclosed by the Director:

(1) The fact that a matter is or is not being investigated or considered by the Committee, Director, or Panel;

(2) With the affected lawyers consent, the fact that the Director has determined that discipline is not warranted;

~~(2)~~ (3) The fact that the Director has issued an admonition;

~~(3)~~ (4) The Panel's disposition under these Rules;

~~(4)~~ (5) The fact that stipulated probation has been approved under Rule 8(d)(3) or 8(e).

~~(5)~~ (6) Information to other members of the lawyer's firm necessary for protection of the firm's clients or appropriate for exercise of responsibilities under Rules 5.1 and 5.2, Rules of Professional Conduct.

Notwithstanding any other provision of this Rule the records of matters in which it has been determined that discipline is not warranted shall not be disclosed to any person, office or agency except to the lawyer and as between Committees, Board, Director,

Referee or this Court in furtherance of their duties under these Rules.

(c) Records after Determination of Probable Cause of Commencement of Referee or Court Proceedings. Except as ordered by the referee or this Court and except for work product, after probable cause has been determined under Rule 9(j)(ii) or proceedings before a referee or this Court have been commenced under these Rules, the files, records, and proceedings of the District Committee, the Board, and the Director relating to the matter are not confidential.

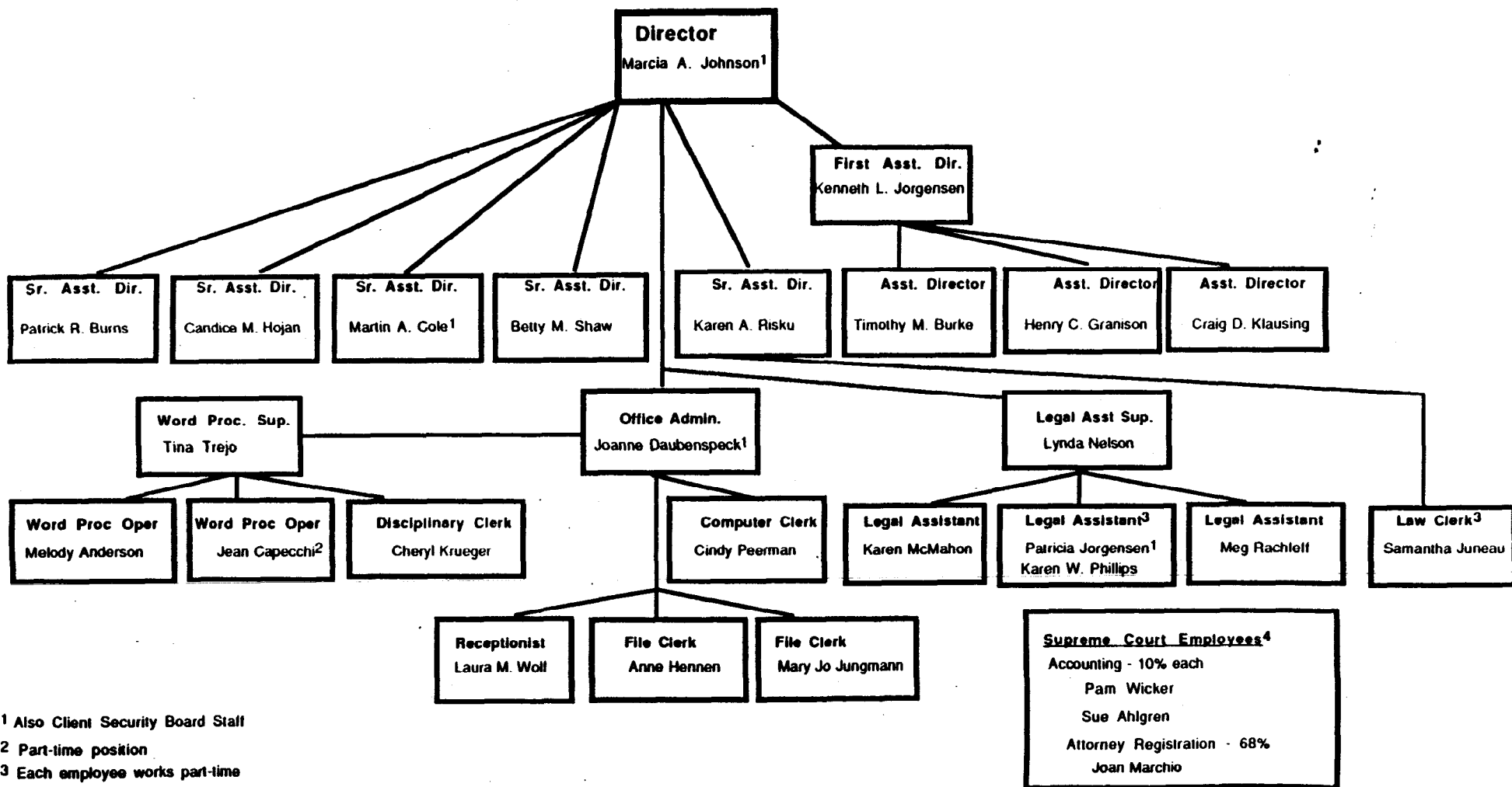
~~(c)~~ (d) Referee or Court Proceedings. Except as ordered by the referee or this Court, the files, records, and proceedings before a referee or this Court under these Rules are not confidential.

~~(d)~~ (e) Expunction of Records. The Director shall expunge records relating to dismissed complaints as follows:

(1) Destruction Schedule. All records or other evidence of a dismissed complaint shall be destroyed three years after the dismissal;

(2) Retention of Records. Upon application by the Director to a Panel Chair chosen in rotation, for good cause shown and with notice to the respondent and opportunity to be heard, records which should otherwise be expunged under this Rule may be retained for such additional time not exceeding three years as the Panel Chair deems appropriate.

**Office of the Director of Lawyers Professional Responsibility
FY'95 Organizational Chart**



1 Also Client Security Board Staff
 2 Part-time position
 3 Each employee works part-time
 4 Not administratively subject to Director's Office.
 Office pays percentage of their salary

DEC SUMMARY AND REPORT -MAY 1994

MONTHS OPEN	12	11	10	9	8	7	6	5	4	3	2	1	0	TOTAL
DEC #/ATTY														
DEC 1 - KLJ							1	0	1	0	3	5	1	11
DEC 2 - KLJ								1	1	6	8	9	7	32
DEC 3 - BMS												2	0	2
DEC 4 - PRB					2	0	4	8	8	12	25	18	23	100
DEC 5 - TMB											1	0	0	1
DEC 6 - BMS													0	0
DEC 7 - BMS												1	4	5
DEC 8 - BMS											1	2	1	4
DEC 9 - BMS													1	1
DEC 10 - BMS													3	3
DEC 11 - KAR									1	0	3	1	2	7
DEC 12 - TMB												1	0	1
DEC 13 - BMS										1	0	0	1	2
DEC 14 - KAR										1	2	2	2	7
DEC 15 - KAR											1	7	2	10
DEC 16 - TMB													1	1
DEC 17 - TMB													0	0
DEC 18 - TMB										2	1	1	0	4
DEC 19 - TMB												1	2	3
DEC 20 - KAR												1	1	2
DEC 21 - TMB									1	2	0	6	1	10
TOTAL FILES	0	0	0	0	2	0	5	9	12	24	45	57	52	206
														0
NO. OF MOS.	0	0	0	0	16	0	30	45	48	72	90	57	0	358
DEC STATUS CODES														
1	Assigned to DEC									70	Status of file requested			
2	Reassigned to DEC									71	Min rec'd - wait file			
3	DEC 1 to be issued									72	Min rec'd - refer panel			
4	DEC 2 to be issued									73	DEC 1B to be issued			
5	DEC 3 to be issued									74	Report rec'd; will be taken			
6	DEC 4A to be issued										off next month's report			
7	DEC 4B to be issued													
8	DEC 5 to be issued													
9	Extension granted													
10	Report at DEC													

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DEC SUMMARY AND REPORT -MAY 1994

AVERAGE AGE OF MATTERS PENDING			AVERAGE INVESTIGATION TIME FOR REPORTS RECEIVED		
	FILES	AVERAGE		FILES	AVERAGE
ALL DECS	206	1.7		52	3.1
DEC 1,3,5-21	106	1.3		26	3.3
DEC 1 - KLJ	11	1.9		4	5.6
DEC 2 - KLJ	32	1.6		7	3.6
DEC 3 - BMS	2	1		3	2.6
DEC 4 - PRB	100	2.2		26	2.9
DEC 5 - TMB	1	2		1	1.6
DEC 6 - BMS	0	0		0	0
DEC 7 - BMS	5	0.2		2	1.4
DEC 8 - BMS	4	1		0	0
DEC 9 - BMS	1	0		0	0
DEC 10 - BMS	3	0		0	0
DEC 11 - KAR	7	1.6		0	0
DEC 12 - TMB	1	1		1	2
DEC 13 - BMS	2	1.5		1	5.1
DEC 14 - KAR	7	1.3		2	3.7
DEC 15 - KAR	10	.9		3	2.9
DEC 16 - TMB	1	0		0	0
DEC 17 - TMB	0	0		0	0
DEC 18 - TMB	4	2.3		1	1.4
DEC 19 - TMB	3	0.3		0	0
DEC 20 - KAR	2	0.5		1	1.9
DEC 21 - TMB	10	1.6		0	0

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