STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2140

Petition of the Lawyers Professional Responsibility Board to Amend Minnesota Rules on Lawyers Professional Responsibility

ORDER FOR PUBLIC HEARING

WHEREAS, Rule 4(c), Rules on Lawyers Professional Responsibility, provides the Lawyers Professional Responsibility Board with general supervisory authority over the administration of the Rules on Lawyers Professional Responsibility,

WHEREAS, on January 27, 1988, the Lawyers Professional Responsibility Board filed a petition requesting a public hearng concerning proposed amendments to the Rules on Lawyers Professional Responsibility,

NOW, THEREFORE, it is hereby ordered that a public hearing be held in the Supreme Court chambers at the State Capitol in St. Paul at 2:00 p.m. on May 12, 1988, to consider amendments to the Rules on Lawyers Professional Responsibility.

IT IS FURTHER ORDERED that any person wishing to obtain a copy of the petition write to the Clerk of the Appellate Court, 230 State Capitol, St. Paul, Minnesota, 55155.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar desiring to present written statements concerning the subject matter of the hearing, but who do not desire to make an oral presentation at the hearing shall file 10 copies of such statement with the Clerk of Appellate Courts, 230 State Capitol, St. Paul, Minnesota, 55155 on or before April 29, 1988, and

2. All persons desiring to make an oral presentation at the hearing shall file 10 copies of the materials to be so presented with the aforesaid clerk together with 10 copies of a request to make the oral presentation. Such statements and requests shall be filed on or before April 29, 1988.

Dated: February 17, 1988

BY THE COURT

Douglas K. Amdahl
Chief Justice

OFFICE OF
APPELLATE COURTS

FEB 17 1988

FILED

C1-84-2140

STATE OF MINNESOTA

IN SUPREME COURT

Petition of the Lawyers Professional Responsibility Board to Amend Minnesota Rules on Lawyers Professional Responsibility

Request to Appear

WILLIAM R. KENNEDY, Chief Hennepin County Public Defender, requests an opportunity to appear and make oral presentation on May 12, 1988, regarding amendments to the Rules on Lawyers Professional Responsibility.

Respectfully submitted,

OFFICE OF THE HENNEPIN COUNTY PUBLIC DEFENDER

By William R Kennedy

William R. Kennedy
Chief Public Defender
Attorney Lic. No. 55220
C-2300 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-5671

DATED: this 29th day of April, 1988

C1-84-2140

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition To Amend The Minnesota Rules On Lawyers Professional Responsibility	Statement Recommending Certain Amendments to the Rules and Opposing the Lawyers Board and Director's Proposals

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INTRODUCTION

When one speaks about the Rules Of Professional Conduct, the Rules On Lawyers Professional Responsibility, and their administration by the Director and Board, there is a difference between what appears to be and what is. This Statement addresses that difference, its repercussions, and the reforms necessary to eliminate the difference between what is and what appears to be.

BACKGROUND

Interference In Pending Litigation

The Directors Office and Lawyers Board, while previously denying any interference in pending litigation, now admit that this has been their practice. See Board and Director's Proposals, p.3.

Discriminatory Administration of the Rules and Retaliation

The Lawyers Board and Director have administered the Rules in recent years in a manner that brings into question the integrity of the lawyer discipline system. For whatever reason, the Lawyers Board and Director have failed to administer the Rules in a competent and fair manner. See Exhibits A - G.

When their actions are challenged, they either deny doing what they have done, or retaliate against the lawyer who challenges their authority, or issue rulings that are in their own self-interest and contrary to existing law.

Conflicts of Interest Situation

The Director has "ruled" that public defenders in the same office do not have a conflicts of interest in multiple representation cases because as "public" lawyers they are not a firm. See Exhibit B.

His motives are suspect. Interference by the Director and Board in pending matters caused a conflicts of interest for our attorneys. The cases involved had to be referred to our conflicts panel for representation at a cost of several thousand dollars. The Board and Director refused to reimburse Hennepin County for their wrongful interference.

The Director's new "rule" eliminates his problem with that issue. If the Hennepin County Public Defender's Office can have no conflict of interest, then neither can the Directors Office or Board.

Apparently, The Board and Director take the view that they are not bound by the normal standards of conduct vis-a-vis conflicts of interest. Their plan "B" must then be that if the standards do govern them, there is sufficient "distance" between the Directors Office and the Board to create the "wall" that insulates both from a conflicts of interest charge, thus freeing either to dismiss complaints of unethical conduct against each other. See Exhibit F.

The Director's new "rule" on conflicts is contrary to existing law. See Exhibits E and H. Despite that, he is apparently announcing the new "rule" at CLE programs. If the Director doesn't know the law and "rules", he is incompetent. If he knows the law and "rules" anyway, he is unfit to be Director.

THEIR PROPOSALS -- AN ANALYSIS

The Board and Director assert sweeping jurisdiction over pending matters. See their Statement, pp 3-5. Despite their claims, they have no judicial power to remedy any wrong, real or imagined, in any pending matter. Nonetheless, they claim to have issued admonitions against defense attorneys in criminal cases for inadequate communication. That is a Sixth Amendment question of ineffective assistance of counsel. No convictions in Minnesota have been reversed on ineffective assistance grounds in years. So, if counsel rendered effective assistance within the meaning of the Sixth Amendment, how can an admonition for inadequate communication with the defendant stand?

The Board and Director's assertion --- that defense counsel will be investigated while a matter is pending if a judge or another lawyer allege he is ineffective --- is ludicrous.

The Director and Board's request that conditional admissions be abolished, should be denied. If granted, it would leave attorneys as the only citizens in any pending matter who could not negotiate on an equal basis with their adversaries. This request by the Director and Board seems designed to embarrass lawyers in public and chastise this Court for its disciplinary decisions.

Their request that mandatory appointment of counsel in disability cases be changed to discretionary appointment should be denied.

REFORM AMENDMENTS TO RULES

The proposed Rules in Exhibit I are reform measures and designed to insure: 1) the fair administration of Justice; 2) that litigants rights and that of their counsel, are protected; 3) the administration of the Rules is fair and free from conflicts of interest; 4) that those who administer the Rules are accountable for what they do; and 5) that any citizen aggrieved by actions of the Directors Office or Board has a remedy.

Proposed Rule 30 accomplishes two things: 1) it removes the obvious appearance of impropriety that exists when the Directors Office handles complaints against the Board and the Board handles complaints against the Directors Office; and 2) insures that complaints against the Director and Board are handled fairly and thoroughly. Those in charge of administration of the Rules should be above reproach.

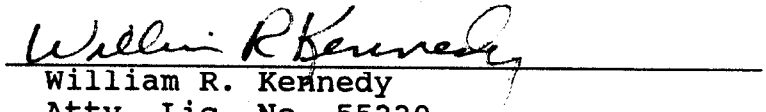
Proposed Rule 31 sets out those instances wherein the Director may intervene in pending matters. The proposal speaks for itself.

Proposed Rule 32 prohibiting the Board and Director from hearing complaints against each other in conflicts of interest situations is designed to take care of those situations not covered by proposed Rule 30.

Proposed Rule 33 requiring training of the Director's Office and the Board is self-explanatory and, based on experience, long overdue. Those covered by the Rule should be required to pay for their own training, thus removing the expense from the Board's budget.

CONCLUSION

The amendments requested by the Director and the Board should be rejected. To allow them to rummage around in pending matters is tantamount to disaster, for it will make all pending matters subject to their authority. The ultimate question, of course, is: Do the Lawyers Board and Directors Office have the same authority and jurisdiction as the Minnesota Supreme Court? Or is it greater?

By 

William R. Kennedy
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Telephone: (612) 348-7530

April 29, 1988

EXHIBITS

EXAMPLES OF DIRECTOR AND BOARD ADMINISTRATION OF THE RULES

Case Number 1

Director investigated assistant public defender for failure to telephone defendant in local jail. Director found "discipline not warranted".

Problem: A jail regulation prohibits prisoner from receiving telephone calls.

Case Number 2

Complaint alleged that attorney told defendant to lie in his guilty plea. Complaint was dismissed but ordered investigated on appeal, a board member stating that such conduct is not part of a post-conviction proceeding. Complaint was investigated.

Problem: The board member was wrong as a matter of law.

Case Number 3

Complaint alleged that assistant public defender was not spending enough time with client involved in dependency and neglect case. Complaint investigated while matter was in trial.

Problem: Obvious interference in pending civil matter.

Case Number 4

Complaint alleged that defendant was denied his rights by transfer of case to another attorney. Complaint under investigation at Board level when appellate courts found that defendant received effective assistance of counsel.

Problem: Defendant threatened assistant public defender, a woman, after she rejected his advances. I transferred the case to another assistant. An ethics complaint issued. Threats against the assistant public defender continued, including written threats posted around the government center. A police investigation resulted. Despite all of this, an investigation was pending at the Board level on question of transfer of attorney when appellate court ruled that defendant received effective assistance of counsel. This case is an outrage!

Case Number 5

Attorney against whom a complaint had been filed - and dismissed - engaged in ex parte communication with board member hearing case on appeal, Complaint alleging Rule 29 violation dismissed.

Problem: This is the classic case of discriminatory administration of the Rules.

- -

In the Matter of the Complaint of

[redacted]

H.C.A.D.C.
300 So. Fourth Street
Minneapolis, MN 55415

against [redacted],
an Attorney at Law of the State of Minnesota.

- -

DETERMINATION THAT DISCIPLINE IS NOT WARRANTED PURSUANT TO RULE 8(c)(1), RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

TO: Complainant and the Respondent Attorney Above-Named:

Based upon the entire file in the above matter, the Director hereby determines that discipline is not warranted.

The complaint alleges several improprieties by respondent. The principal complaints are alleged conflict of interest and inadequate representation.

As to the conflict of interest, complainant alleges that the public defender's office is disqualified from representing two defendants with adverse interests. Complainant cites Rule 1.10, Rules of Professional Conduct. Rule 1.10, does not apply to public law offices. All of the provisions of Rule 1.10 apply to "a firm", but ". . . a government legal department is not a single 'firm' under Rule 1.10 [Rules of Professional Conduct] (conflict of interest)" Humphrey v. McLaren, 402 N.W.2d 535, 543 (Minn. 1987). Thus, an attorney in a public defender's office may represent a client even though another attorney in the same office could not because the second attorney had a conflict.

As to the claims of inadequate representation, the Lawyers Professional Responsibility Board has adopted a policy of summarily dismissing complaints by criminal defendants that their attorneys are providing inadequate representation. Such complaints may be submitted by the defendant to the trial judge or chief district court judge. If appropriate, the judge may refer the matter back to this Office for investigation. When criminal proceedings are no longer pending, the defendant may also re-submit the complaint to this office.

At complainant's request, a copy of his complaint is returned to him herewith.

The Director's office is limited to investigating complaints of unprofessional conduct and prosecuting disciplinary actions against attorneys. It cannot represent complainants in any legal matter or give legal advice. Complainant must retain an attorney if either legal advice or representation is desired.

NOTICE OF COMPLAINANT'S RIGHT TO APPEAL

If the complainant is not satisfied with this decision, an appeal may be made by notifying the Director in writing within fourteen (14) days of this notice. An appealed decision will be reviewed by a designated Lawyers Professional Responsibility Board member, whose options are limited to (1) approving this decision, (2) directing that the case be submitted to a hearing panel, or (3) requiring further investigation. This determination will generally be based upon the information which is already contained in the file.

Enclosed with this notice to respondent, is a copy of the original complaint.

Dated: March 1, 1988.

William J. Wernz

WILLIAM J. WERNZ
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY
520 Lafayette Road, 1st Floor
St. Paul, MN 55155-4196
(612) 296-3952

WJW/lb
Enclosures

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OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487-0520
(612) 348-7530

William R. Kennedy, Chief Public Defender

April 14, 1987

William J. Wernz, Esq.
Director, Office Of Lawyers Professional Responsibility
520 Lafayette Road First Floor
St. Paul, MN 55101

Dear Mr. Wernz:

The Dreher Committee was formed as a direct result of the abuses of investigative power exercised by your office. Specifically, your office improperly entered the constitutionally protected area of Freedom of Speech. You stated to the Dreher Committee and the Minnesota Supreme Court that those excesses were the responsibility of your predecessor; that you had taken steps to remedy those past excesses. In spite of your assurances, the Dreher Committee adopted Recommendation 5 as did the Minnesota Supreme Court.

By your recent actions regarding two lawyers in my office, [redacted] and [redacted], I can only conclude that you intentionally mislead both the Dreher Committee and the Minnesota Supreme Court.

In the case of [redacted], the complainant alleged that his guilty plea was invalid because his attorney told him to lie on the stand during the plea. If true, both the client's perjury and his counsel's subornation of it are indictable offenses. Issues that by law must be heard by a judge in a post conviction hearing, and issues that should be referred to the county attorney's office for investigation and prosecution. You initially concluded that an investigation should not be initiated by your office because the complainant had a remedy via post conviction proceedings. The complainant appealed and Ms. Ferguson ordered a full investigation.

David Knutson, our chief deputy, represented [redacted] and contacted Ms. Ferguson. Her responses were most interesting and clearly show that your office will not follow the Dreher Committee recommendations. Ms. Ferguson first responded to Mr. Knutson that she did not think post conviction proceedings covered this situation. Apparently, she has no criminal law experience and did no legal research before rendering that legal opinion.

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Mr. Knutson provided Ms. Ferguson with case law showing that this situation was covered by post conviction proceedings. Ms. Ferguson nonetheless stated that she determined that an investigation was appropriate because [redacted] was accused of acting unethically. Obviously, if the decision to investigate turns on whether a lawyer is accused of unethical conduct, you will always investigate, even in areas where you have no jurisdiction to do so. The fact that this investigation was commenced through the appellate process does not excuse you personally. You are ultimately responsible.

Recently I received a dismissal of yours regarding a complaint of [redacted]. You stated the basis for the dismissal as follows:

> The Minnesota Supreme Court, to which this office is accountable, in 1986 adopted the recommendation of its Advisory Committee that this Office should not normally be involved in post-conviction claims of ineffective assistance of counsel unless a court first finds inpropriety.

This standard applies to [redacted]. If the [redacted] complaint is appealed and Ms. Ferguson orders an investigation, is your office still accountable to the court? The decision whether to grant a complainant's appeal seems based on the flip a coin standard. The [redacted] case is a perfect example of that approach by the Board, especially by Ms. Ferguson.

In the case of [redacted], you determined that it was appropriate to enter a case currently set for trial and investigate [redacted]. That complaint "alleged" [redacted] did not return client phone calls (the client was in jail and not reachable by phone); that [redacted] continued the trial dates (the court did because of judge or prosecutor unavailability); and that a private lawyer was given a copy of police reports (done so at complainant's direction for the purpose of hiring that private attorney). That complaint alleged no unprofessional conduct. You still determined an investigation was appropriate.

Your decision to investigate shows you have no intention of staying out of pending litigation. It also shows that you mislead the Dreher Committee and the Minnesota Supreme Court.

To add insult to injury, the investigator in [redacted] case was wholly inexperienced in criminal defense work and totally incapable of appreciating the complexity of our functions. For instance, [redacted] conducted additional investigation after the first trial had been continued by the Court. The investigator could not understand why that would happen if the attorney was prepared for trial at the first trial date. Apparently that investigator has never been confronted with a client who divulges new information late in the attorney-client

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relationship. Such confusion may be understandable in the civil area where depositions, interrogatories, etc. "lock in" a client's position. However, that confusion is inexcusable in criminal cases.

Nonetheless, [redacted] now has a file open on him which will haunt him for the rest of his professional career. This file should never have been opened. Your activities in this regard seriously jeopardize the entire discipline system.

Your actions, however, have more than a personal impact on the attorney. You have created a conflict of interest for that lawyer and his associates in this office. Consequently, those cases are referred to the Conflict's Panel. As I stated to the Minnesota Supreme Court, you will receive the bill for the cost of providing private counsel in those cases where you intervene in pending litigation. In the recently completed case of State v. Redding your office will receive the bill for conflicts' counsel because of your unwarranted interference. While the final figures are not yet in, that bill appears to be in excess of $60,000.

You have stated that you did not view these situations as creating a conflict of interest that requires outside counsel. Not only is it improper for you to give advice in this area when you have a financial stake in the outcome but the advice is wrong and offers no legal protection for my staff should we make the mistake of following your opinion.

Your advisory opinions do not bind courts when the client makes a collateral attack on his conviction, maintaining his attorney was acting under a conflict of interest. As you know, the Minnesota Supreme Court very thoroughly scrutinizes conflict of interest claims in criminal cases and your opinions are not binding on them or on any judge.
If the client's due process rights are violated, it makes little or no difference what your opinion is.

The informal opinions you have issued in this area are conflicting. When you presided at an ethics course offered to government lawyers, we brought up this specific problem. You told us there was no conflict of interest. You analogized the matter to an attorney probating an estate and receiving a complaint from the heirs. You told us he still had the right to continue to probate the estate. We told you that analogy was false because the attorney was representing an estate and not the people who filed the very ethics complaint he was defending against. In spite of that, you persisted in that opinion. If you are so certain of your legal opinion, please obtain a declaratory judgment to that effect.

The Rules of Professional Responsibility specifically prohibit an attorney from representing a client when it is against his own personal interest to undertake that representation. It is

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impossible for an attorney to defend himself from a client and attack the client's credibility while at the same time attempting to represent that client in front of a jury or a judge. The attorney cannot call his client a liar in one forum and a truth-teller in another. It's called divided loyalties.

In a recent conversation with Mr. Philip Nelson of your office he agreed that it was a conflict to continue representation of a client while an ethics file was open against that attorney based on a complaint from the same client. However, Mr. Nelson told us it was merely a conflict for the attorney, and not for the office. Therefore, the case could be transferred within the office.

This opinion is even more ridiculous than your initial advice. Mr. Nelson did not explain how a conflict for one lawyer is not a conflict for the office. Imagine the position I would be in as Chief Public Defender in keeping a case within the office, despite the ethics complaint, and merely transferring the matter to another lawyer. I can imagine the judicial rhetoric in the opinion granting relief to the defendant for my failure to have a conflict's attorney handle the matter. Mr. Nelson also did not explain how we can convince the trial courts that their trial schedules must be changed in order to accomodate your investigation of pending litigation.

Your office is also derelict in another of its' responsibilities. In a pending criminal case your office fails to inform the defendant that s/he is waiving privilege by filing an ethics complaint and participating in the investigation. There is no conditional waiver of attorney-client privilege. If the client does waive privilege s/he has waived it forever and his/her statements to you and your investigators may well be subject to subpoena by the prosecutor.

Your office should have the decency to tell a defendant who is facing a lengthy prison sentence that his/her statements to you may not be protected from the prosecutor, and indeed may be used to convict him/her. As of this writing you have not done so. In fact you have not seen the problem.

I have approached this problem in a reasonable manner as an officer of the Court. You have demonstrated a refusal to follow the Supreme Court's recommendations after first misleading the Court as to your practices and intentions. You have refused to acknowledge that a problem exists let alone that you are a part of it.

Neither your office nor the Lawyers Board is in charge of the criminal justice system. Neither your office nor the Board has any authority to determine the Due Process rights of the accused; whether s/he receives a fair trial; whether s/he has been afforded equal protection of the laws; whether s/he has been afforded effective assistance of counsel. Your office and the

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board, however, continue to insist that unless you determine those rights, the defendant will be denied his/her constitutional protections. Nonsense. The Judiciary has the responsibility to determine those issues. You and the board do not.

In a democracy it is not an inalienable right that the oversight of lawyers belongs to lawyers.

William R. Kennedy
Chief Public Defender

cc: Honorable Douglas K. Amdahl
Honorable Lawrence R. Yetka
Honorable George M. Scott
Honorable Rosalie E. Wahl
Honorable John E. Simonett
Honorable Glenn E. Kelly
Honorable M. Jeanne Coyne
John D. Levine
David C. Bach
Lee Ball
Gregory M. Bistram
Elizabeth Norton Ferguson
Michael F. Fetsch
George W. Flynn
Fenita Foley
Julius E. Gernes
Joan M. Hackel
Charles R. Kennedy
George R. Kerr
Paul Kinney
Dennis J. Korman
George O. Ludcke
Joan S. Morrow
Alice Mortenson
James R. Schwebel
Robert M. Shaw
Katherine Tarnowski
Richard C. Taylor
Rollin J. Whitcomb

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OFFICE OF
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DIRECTOR
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FIRST ASSISTANT DIRECTOR
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ASSISTANT DIRECTORS
CANDICE M. HOJAN
PHILLIP D. NELSON
KENNETH L. JORGENSEN
MARTIN A. COLE
BETTY M. SHAW

May 12, 1987

PERSONAL AND CONFIDENTIAL

William R. Kennedy, Esq.
Chief Public Defender
C-2200 Government Center
Minneapolis, MN 55487-0520

Dear Mr. Kennedy:

I am writing to respond to some of the contentions made in your recent letters to me and Elizabeth Ferguson, particularly your April 14 letter. Please refer also to my March 12, 1987, letter to you which also addresses some of these issues.

JURISDICTIONAL QUESTIONS AND THE OPENING OF A FILE.

In Minnesota, as in most or all other jurisdictions, the State Supreme Court asserts exclusive jurisdiction over lawyers professional responsibility and discipline. See In re Daly, 291 Minn. 488, 189 N.W.2d 176 (1971); and In re Greathouse, 189 Minn. 51, 248 N.W. 735 (1933). For approximately the last 15 years, the Court has conferred on the Lawyers Professional Responsibility Board and the Director certain duties and jurisdiction, under the Rules on Lawyers Professional Responsibility (RLPR). Rules 6(a) and 8(a) state the general duties and authority to investigate, as follows:

> 6(a) **Investigation.** All complaints of lawyers' alleged professional conduct or allegations of disability shall be investigated pursuant to these Rules.
>
> 8(a) **Initiating investigation.** At any time, and upon a reasonable belief that professional misconduct may have occurred, the Director may make such investigation as he deems appropriate as to the conduct of any lawyer or lawyers; . . .

To the best of my knowledge, for at least the last 10 years, the "all complaints" in Rule 6(a), has been interpreted to mean that the Director has to give at least some consideration to every complaint. This has been done by opening a file, and either investigating the complaint (usually by referral to a district committee) or by summarily dismissing it.

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I believe I am duty-bound at least to open a file whenever complaints of lawyers' unprofessional conduct are submitted to me. The Dreher Committee, in connection with Recommendation 5 (to which you refer), described the Director's then-current practice of screening out certain matters by summary dismissal and reported, "The Committee commends the Director for this practice." The Committee recommended expanding the practice. I gather, particularly from your April 28 letter, that you condemn what the Dreher Committee commended, namely the file-opening and summary dismissal process.

Jurisdiction over complainant appeals arises under Rule 8(d), RLPR. I have no authority to deny a complainant his or her right to appeal my disposition anymore than I have a right to avoid making a disposition by refusing to open a file. It would be very undesirable for the public and the profession to vest in the Director the unreviewable discretion to decline even to open a file in cases in which the Director believed it was inappropriate to do so. A dominant theme of the Dreher report was to increase the Board's supervisory function over the Director.

Your complaints against me in the [redacted] and [redacted] summary dismissal matters are apparently based upon my opening a file and notifying the complainants of appeal rights under Rule 8(d). Under that rule, the complainant has an appeal right, whether or not I give notice.

Judging from your May 1 letter (referring to the complaint against [redacted], which I also summarily dismissed and referred, upon appeal, to a Board member) you object to the reviewing Board member's having the authority to refer the complaint for investigation. That authority was conferred by the Supreme Court's 1986 Amendment to Rule 8(d), made at the recommendation of the Dreher Committee. Page 56 of the initial Committee report stated, regarding complainant appeals:

> In accordance with other recommendations as to broadening the dispositional authority of the Board panel's, the Committee believes that the panel chairman should have broader authority at this point.

The Lawyers Board opposed this recommendation stating in pertinent part:

> There is disagreement over whether the options in reviewing complainant appeals should be expanded. . . . Expansion of panel disposition options upon a complainant appeal would impair consistency in

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> the disciplinary system. . . . The complainant is not really a part in disciplinary proceedings, and should at most be accorded only the right to reversal on appeal of a seriously mistaken disposition--one where public discipline should have been imposed.

See February 6, 1986 Board Statement, p. 22. The Court adopted a modified version of the Dreher recommendation. Now it appears that you are attacking me and the Board for implementing a rule change which we opposed.

DREHER RECOMMENDATION 5 AND DEFERRING TO OTHER FORUMS.

In the comment to Rule 5, the Dreher Committee stated:

> The limited resources of the Director's Office should be judiciously employed. Towards that end, the initial screening of complaints should identify matters which can more appropriately go forward in an alternative forum prior to commencing a lawyer discipline investigation. The Director's office currently screens out, as appropriate, matters in which judicial or administrative proceedings are already under way. The Committee commends the Director for this practice. It is suggested, however, that the Director also consider requiring complainants, alleging grievances for which an alternative forum is readily available, to exhaust those remedies first.

(At p. 19-20). I stand by my reports to the Committee and the Court that this recommendation has been adopted.

Because the Board supervises this office and because the Board has a role in complainant appeals, the Board, rather than the Director, should adopt guidelines describing classes of cases which may be summarily dismissed, with leave for re-submission if the alternative forum makes certain findings. The Board has adopted such guidelines, which are designed for consistency rather than absolute uniformity, and which are based primarily on the Dreher Committee concern with proper use of "the limited resources of the Director's office." Pursuant to these guidelines, the summary dismissal rate has been increased from about 17% during the period 1982-84, to 30% in 1985, to 34% in 1986, to 40% in 1987 (through April 30). The great majority of the summary dismissals are deferrals to alternate forums. I am personally concerned that the public's confidence in the Lawyer Professional Responsibility system may be eroded if we defer even more often to other forums.

Last week I received a letter from a judge, complaining of a lawyer's incompetent representation in two criminal matters. No ineffective assistance judicial proceedings have been commenced or were likely to be. Before reporting the lawyer, the judge consulted with other judges, an ethics professor, and several attorneys. The judge reported that:

> Sadly, several believed it unlikely that the Board would fully engage [the attorney's] case because they believed the Board has generally failed to deal with "mere competence issues" and with the implications of Rule 1.1. I hope they're wrong. [The client] suffered substantially because the Minnesota lawyer's representation of him was worse than no lawyer at all. If you won't protect the public from the untrammeled mindlessness of [the attorney] who will? It is no answer to say that [the client], an unsophisticated, working-class [person], should once again consult the yellow pages and try to find another lawyer to sue [the attorney] for damages. His trust in lawyers in severely damaged, and malpractice suit are cruelly difficult for common people to find counsel for.

I take it that your position is that if this unsophisticated, working-class person had complained, instead of the judge, that the constitution would require me to tell him (and any other non-judges who happen to be complaining against the same attorney), that this office was constitutionally forbidden to give any consideration to his complaint until he obtained relief in the criminal justice system. If the constitution, or policy considerations, would require or suggest such a posture by this Office, surely it should be adopted by the Board or the Court, and not solely on my discretion under Rule 8(a). This brings us to the question, raised in your April 14 letter, of my being both "personally" and "ultimately" responsible.

AUTHORITY/RESPONSIBILITY.

The Dreher Report (pp. 34-44) was concerned greatly with lines of authority and accountability within the system. To remedy various ambiguities, ". . .The Committee recommends that Rule 5 be revised to place first line supervisory responsibility for the Director's office with the Board." (p. 35). For more regular monitoring, it was also recommended, ". . . A [Executive] committee of the Board should be created to supervise the Director's office." (p. 39). I retain a good deal of personal and ultimate responsibility, because I still have considerable discretion in some areas, and because I make recommendations to the Executive Committee and Board. I also report to the Board

and Court. I regard my responsibility in sending the [redacted] and [redacted] summary dismissal appeals to Board members as being largely ministerial, and without discretion. In the [redacted] matter, which was sent to the district committee for investigation and then dismissed, I had somewhat more discretion and responsibility.

The Board has assumed its responsibilities to the Court, including supervision of this office, through the Executive Committee and other committees, as well as by general Board action. As you know, John Levine appointed a subcommittee to deal with criminal law matters, consisting of Michael Fetsch, Julius Gernes, and George Ludcke. That committee spent a great deal of time investigating various of your complaints, including some dating back to events in 1981. The Committee for several months also received and reviewed copies of criminal law complaints and the way in which this Office handled them. It concluded that the matters were being handled appropriately.

The question of exactly when this Office should defer to alternate forums is a difficult one. Nearly every complaint we receive concerns a lawyer's alleged actions or inactions in some area of law, in which there is a forum. There are problems that can arise in too freely deferring to alternate forums, including:

1. The concern of the alternative forum (usually the determination of a particular party's rights) is not generally the same as the concern of the professional responsibility system (the protection of the public generally, the fitness of the lawyer, and whether a violation of a rule of professional conduct occurred).

2. Proceedings in alternate forums may be slow and may terminate inconclusively. For example, in a civil matter, the parties may reach a financial settlement without any determination of facts.

3. Alternate forums available in principle may not be truly available in fact. The judge quoted above noted what may be the illusory availability of a malpractice action. The judge also indicated that a post-conviction remedy may not be available practically for some convicts, for example those who are incarcerated upon conviction, but with a relatively short sentence.

4. The alternative forum may lack investigative resources needed for resolution of the complaint. It is often necessary, when investigating an ethics complaint, to

contact several parties, and sometimes to review documents, which may be voluminous. It may be that neither the party bringing the complaint, nor the alternate forum, has the resources, or the intention to use the resources, to do the necessary investigation. In such cases, deferring to the other forum may not be appropriate.

5. The alternate forums may be multiple and inconsistent. A general practioner may appear before different courts in different areas of law and exhibit a common problem (e.g., alcoholism resulting in neglect), without any forum addressing the problem as such.

CONFLICT OF INTEREST AND ADVISORY OPINION.

Your April 14 letter indicates:

> You have created a conflict of interest for that lawyer [subject to the complaint] and his associates in this office. Consequently, those cases are referred to the conflict's Panel.

I have received your bill in connection with one such case. On March 12 I offered the services of our office in giving an advisory opinion on whether such a conflict exists, and whether it is imputed to your entire office. I gather you do not wish to have such an opinion from us. I would appreciate it if you would at least answer three questions about your conflicts policy:

1. If disqualifying conflict is occasioned by our investigating a complaint from a public defender's client, why would there not also be a disqualifying conflict if a judge investigated the complaint?

2. By what Rule of Professional Conduct, or case interpreting the sixth amendment or other constitutional right, is any conflict an individual public defender might have imputed to the entire office?

3. Why did [redacted] not avail himself of the continuance of the ethics investigation which was offered him in our Notice of Investigation?

I believe the Criminal Law Committee of the Board, as well as I, would be interested in the answers to these questions.

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EXPUNCTION RULE AND DISCLOSURE PRACTICE.

In your April 14 letter (p. 3) and your April 28 letter to me (p. 2), you make the following statement and pose the following question:

> . . . [redacted] now has a file open on him which will haunt him for the rest of his professional career.
>
> * * *
>
> [redacted] now has an ethics file in your office. . . . If his file isn't destroyed, and you respond to inquire by stating that while he was accused of lying and suborning perjury, the complaint was dismissed, what do you think will happen?

[redacted] file will not haunt him indefinitely, because Rule 20(d)(1) provides, "All records or other evidence of the existence of a dismissed complaint shall be destroyed three years after the dismissal." During the three years between dismissal and destruction of the file, our response to any authorized inquiry will not disclose the fact of the complaint, the existence of the file or the nature of the allegations. Our disclosure letters are identical for attorneys who have had no complaints and attorneys who have had complaints resulting in dismissals.

Regarding your claim that the [redacted] complaint "alleged no unprofessional conduct," I would disagree. I believe it alleged violations of Rule 1.4.

PERSONAL ACCUSATIONS.

Your letters allege that I "intentionally misled" the Court; that my actions entail "unprofessional conduct" and that I am "rude, demeaning, and arrogant." I will not reply, unless any member of the Court or the Board, believes that there is the least glimmer of credibility to any of these accusations.

Very truly yours,

William J. Wernz
Director

WJW/rlb
cc: Honorable Glenn E. Kelley
Lawyers Board Members

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HENNEPIN

OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487-0520
(612) 348-7530

William R. Kennedy, Chief Public Defender

June 2, 1987

William J. Wernz, Director
Office of Lawyers Professional Responsibility
520 Lafayette Road, 1st Floor
St. Paul, MN 55155

Re: Your various assertions of legal and judicial jurisdiction

Dear Mr. Wernz:

Your claim under the Rules to sweeping jurisdiction over pending litigation is reminiscent of a former Director's claim to unlimited power to investigate. It is as if we are trapped in a Time Warp.

When I read your decrees, I pinch myself to see if I'm dreaming.

You claim sweeping power over everyone involved in litigation at trial and on appeal. You claim sweeping power to determine whether a defendant's rights have been violated, to "police" contested matters, and to determine procedural and substantive rights.

You suggest that any conflict of interest an individual public defender might have is not imputed to the entire office. You claim a lawyer may continue his/her representation of a criminal defendant so long as an ethics investigation of that representation is continued until the case is over. You intimate that if your investigation of a trial lawyer disqualifies that lawyer from continuing representation, so does the trial judge's inquiry.

You assert compliance with Dreher Committee Rule 5 as adopted by the Supreme Court. You report that the Lawyers Board subcommittee on criminal law approves the way you are handling matters. Finally, you insist that a lawyer's ethics file will not haunt him/her beyond three years.

These claims and your conduct raise fundamental questions about power and its abuse.

YOU HAVE NO LEGAL OR JUDICIAL RIGHT TO INTERFERE WITH PENDING LITIGATION

Like the butcher's thumb your interference tips the scales of Justice.

You are not in charge of quality control for the legal profession. The Rules you claim to enforce give you no right to "police" contested matters. No constitutional, statutory, or case decision gives you the legal right to determine the guilt or innocence of a defendant, who is at fault in an accident, or who gets custody of a child.

Your "determination" that a defendant's rights have or have not been violated has no legal significance whatsoever. A defendant is not entitled to be released upon your "finding" that his rights have been violated. Conversely, your "finding" that a defendant's rights have not been violated cannot be used by the State to deny habeas corpus relief.

CONFLICT OF INTEREST

Please note:

The Minnesota Rules Of Professional Conduct mandate:

> A lawyer shall not represent a client if the representation of that client may be materially limited by ...the lawyer's own interest,... Rule 1.7(b);
>
> While lawyers are associated in a firm, none of them shall knowingly represent a client when anyone of them practicing alone would be prohibited from doing so by Rules 1.7,.... Rule 1.10(a);
>
> ... a lawyer shall not represent a client ... where... the representation will result in violation of the Rules of Professional Conduct or other law;... Rule 1.16(a)(1).

DREHER COMMITTEE RULE 5, THE REYNOLDS AFFAIR & YOUR CONDUCT

In Rule 5 the Dreher Committee recommended, and the Supreme Court adopted, the principle that you not interfere in pending litigation.

The [redacted] matter involved a pending sexual conduct felony criminal case, State v. Everett Page, Henn. Co., D.C. #86-2086. While the case was awaiting trial, you interfered by processing a complaint by the defendant against his lawyer, [redacted]. The case then had to be referred to our conflicts panel.

Despite your claim to the Court that you follow Rule 5, there are some of us who watch what you do.

Your interference in pending litigation devours your words.

THE CONSEQUENCES OF YOUR INTERFERENCE IN PENDING MATTERS

Procedurally, the case is delayed. A new lawyer is required for the jailed defendant who stays there even longer. Our budget costs are increased to pay for the services of a conflicts lawyer. You've already indicated that such a matter is but a trifle, and of no concern of yours.

Substantively, speedy trial rights are jeopardized. If in trial, a mis-trial is likely. Possible double jeopardy consequences follow.

There are other serious legal consequences that flow from your unlawful interference in pending litigation just as naturally as the Rhine flows north to the sea.

ETHICS COMPLAINTS LIVE FOREVER

Your claim that [redacted] file will not haunt him indefinitely is misleading. Your files are subject to subpoena by the government. They are admissible, subject to relevancy, on any issue involving the defendant's conduct, intent, or state of mind. [redacted] file is there for the world to see.

Furthermore, most states inquire "Have you ever been the subject of an ethics investigation?" when a lawyer seeks admission to practice. When asked, a truthful lawyer answers "Yes". Or do you propose that s/he lie? Should s/he lie during the three year existence of your file? Or should s/he wait to lie until after you have destroyed it?

ADVISORY OPINION

You seem anxious and curiously eager to render an advisory opinion to our office on conflicts of interest matters that are in dispute. I'm sure it has nothing to do with the $54,000. conflicts bill I sent you for your wrongful interference in a pending criminal case, or your refusal to pay it. Of course not.

Your office has previously given us two informal and conflicting opinions about conflicts of interest. First, we were told that no conflict existed between an assistant public defender and the client when that client had filed an ethics complaint against the lawyer. You indicated that the defendant could still be represented at trial by the same attorney.

Later, while admitting that an assistant public defender had an ethical conflict, your office insisted that he/she could continue representation. All that was needed was that the ethics investigation not take place until the trial was over. Or, you said, another lawyer from the same office could handle the matter.

Your next version will doubtless be worthy of a Borgia.

THE ANONYMOUS JUDGE'S LETTER

A trial judge's duty is to see that Justice is done. That duty is clear and unambiguous. When faced with the possibility that a defendant's rights are being violated, the judge must act immediately.

What must the judge do? To protect the "right to conflict-free counsel, the trial court has an affirmative 'duty to inquire' into the effectiveness of counsel whenever 'the possibility of a conflict' becomes apparent before or during trial." Douglas v. United States, 488 A.2d 121, 136 (D.C.App. 1985) citing Wood v. Georgia, 450 U.S. 261, 272 (1981).

The trial judge has the "duty to ensure that the assistance thereby rendered to an accused comports with at least the minimum level of competence consistent with our standards of the fair administration of justice." Monroe v. United States, 389 A.2d 811, 816 (D.C.App. 1978).

Your anonymous judge apparently didn't do that. He sat idly by and watched a criminal defendant get "...[legal] representation ... worse than no lawyer at all." As if he, this anonymous judge, were but a spectator while Rome burned. Letter from William Wernz to William Kennedy (May 12, 1987).

Both of you should know that post-conviction proceedings are available to all defendants. The State Public Defenders Office represents indigent defendants in post-conviction matters. There is no time limit on post-conviction proceedings. They may be held before or after an appeal.

Post-conviction forms are readily available. Once filed, the defendant is entitled to an evidentiary hearing on his allegations. Witness are called and testify under oath. If the court finds that the defendant received ineffective assistance of counsel, a new trial will be ordered. If the court finds that defendant's counsel was not ineffective, there can be no ethical complaint against that lawyer for his/her representation.

Did your anonymous judge inform the defendant that 1) his rights were violated; 2) his lawyer was legally ineffective; 3) he, the judge, had filed an ethics complaint against his lawyer; and 4) post-conviction relief was available before him?

Did <u>you</u> inform the defendant that 1) his rights were violated; 2) his lawyer was legally ineffective; 3) the judge had filed an ethics complaint against his lawyer; and 4) post-conviction relief was available in front of the same judge?

If perchance neither of you has had a chance to let the defendant know what's going on, please send us his name and we'll take care of it.

THREE QUESTIONS AND ANSWERS ABOUT CONFLICTS

You ask:

> 1) "If disqualifying conflict is occasioned by our investigating a complaint from a public defender's client, why would there not also be a disqualifying conflict if a judge investigated the complaint?"

Our answer:

> 1) You assume that a conflict arises by the mere questioning done by a client. You are mistaken. Judges are charged with the responsibility to see that justice is done. If a client addresses a complaint to a judge, that judge has the duty to see if there is or is not effective assistance of counsel. If a judge is satisfied that effective assistance has occurred, the matter ends.
>
> We do not believe that the attorney and client must agree 100% of the time to avoid a conflict of interest. If the judge determines that the lawyer has been ineffective, the judge will discharge the attorney and proceed in a way the judge believes is most appropriate.
>
> However, your entry into a pending case is completely different. You do not have the authority to determine if a client's rights have been violated. You do not have the authority because you do not have the power to remedy. Your authority is limited to the determination of whether the attorney acted unethically and if so, what should be done to the attorney.

Because your focus is limited to the attorney, your entry into the case before completion causes a conflict in the attorney-client relationship. The conflict arises because you have determined that a complaint rises to the level of an accusation of unprofessional conduct. Because your investigation is accusatory, i.e., has the attorney acted unethically, the attorney has a personal interest in his own representation.

This conflict applies even if the investigation is postponed at the attorney's request. Consequently, because of these divided loyalties, the attorney cannot continue representation. If you do not understand or accept this real world conflict, then your knowledge and understanding of the practice of law is so inadequate that you should resign your position.

You ask:

2) "By what Rule of Professional Conduct, or case interpreting the sixth amendment or other constitutional right, is any conflict an individual public defender might have imputed to the entire office?"

Our answer:

The "... disqualification of one attorney from the public defender's office would disqualify the remaining attorneys in that office." Ethics Opinion, 85-16 (So. Carolina, 1985).

The Sixth Amendment requires conflict free representation. "For this reason the importance of ensuring that defense counsel is not subject to any conflict of interest which might dilute loyalty to the accused has been long and consistently recognized: '[t]he right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client.' Von Moltke v. Gillies, 332 U.S. 708, 725, 68 S.Ct. 316, 324, 92 L.Ed. 309 (1948); accord Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) (defense counsel 'owes the client a duty of loyalty, a duty to avoid conflicts of interest') (citation omitted); Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981) (the Sixth Amendment gives rise to a 'correlative right to representation that is free from conflicts of interest')." Douglas at 136.

For additional authority, see the Rules of Professional Conduct, specifically, Rules 1.7(b), 1.10(a) and 1.16(a)(1).

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You ask:

> 3) "Why did [redacted] not avail himself of the continuance of the ethics investigation which was offered him in our Notice of Investigation?"

Our answer:

> Your question asks why [redacted] was not willing to be counsel for his client in one forum today and his client's adversary in another tomorrow. As soon as [redacted] learned of your ethics investigation, "... he acquired a personal interest in the way he conducted [the] defense--an interest independent of, and in some respects in conflict with, [the defendant's] interest in obtaining a judgment of acquittal." Douglas v. United States, 488 A.2d 121, 136 (D.C.App. 1985). Your suggestion that this conflict can be temporarily postponed is ludicrous.

SOME QUESTIONS FOR YOU AND THE LAWYERS BOARD

Having answered your questions, I have some questions for you and the Lawyers Board.

1) A person complains to you about the following. While riding on a Government Center elevator after lunch one day,the complainant noticed that a man he later identified as an assistant public defender, had the odor of alcoholic beverages on his breath. The complainant gives you this lawyer's name and insists that you discipline this alcoholic lawyer. What do you do?

2) A lawyer and spouse are separated. They are Roman Catholic. Dissolution pleadings are being prepared. The spouse complains to you that the lawyer spouse is dating, creating a situation that is not only morally wrong, but harmful to the couple's two children. S/he insists that you discipline the lawyer spouse for unethical conduct. What do you do?

3) A divorce case is pending. The husband complains to you that his wife's lawyer is misleading his lawyer and the court about his wife's assets. He insists that you immediately discipline his wife's lawyer. What do you do?

4) A criminal trial is in progress. During opening statement the prosecutor refers to the defendant's pre-trial silence as an admission of guilt. The judge overrules defense counsel's objection and denies a motion for mis-trial. The defendant immediately complains to you, claiming the prosecutor and judge are violating his rights. He

insists that you intervene immediately or his rights will be gone. What do you do?

5) An incarcerated defendant, awaiting trial, complains to you that his lawyer isn't doing anything to get him out of jail. He insists that you discipline the lawyer. What do you do?

6) A person complains to you about the following. He observed a male lawyer displaying affection for another male while the two were walking through Loring Park in Minneapolis. The complainant insists that you discipline the lawyer for unethical conduct. What do you do?

7) An incarcerated defendant, awaiting trial, complains to you that his lawyer isn't investigating his case. He also complains that the chief public defender refuses to give him another lawyer. He insists that you do something about all this. What do you do?

THE LAWYERS BOARD SUBCOMMITTEE ON CRIMINAL LAW

You cite this subcommittee as approving your conduct and that of the Lawyers Board. Please send me their report. Please send me the names, addresses and telephone numbers of subcommittee members.

COMPETENCY AND LAWYER DISCIPLINE

The Rules you claim to enforce also govern your conduct and that of the lawyers on the Lawyers Board. The Rules require:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
> Rules of Professional Conduct 1.1 Competence

You and most members of the Lawyers Board appear ignorant of criminal and constitutional law. Ignorance is not bliss. Nor is it a defense to a charge of incompetence or misconduct on your part. Unless you and the Lawyers Board claim exemption from the Rules. Do you?

YOUR CONDUCT AND MY OBSERVATIONS

You mislead people. In telling the Supreme Court that you do not interfere with pending litigation, you mislead. In advising defendants that your forum is the place to go with ineffective assistance of counsel complaints, you mislead. In claiming that your office or the Lawyers Board has the legal right to determine substantive or procedural rights, you mislead. Etc., etc., etc.

William R. Kennedy
Chief Public Defender

cc: Those Involved

OFFICE OF
LAWYERS PROFESSIONAL RESPONSIBILITY
520 LAFAYETTE ROAD
FIRST FLOOR
ST. PAUL, MINNESOTA 55155-4196
612-296-3952

DIRECTOR
WILLIAM J. WERNZ
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MARTIN A. COLE
BETTY M. SHAW
WENDY WILLSON LEGGE
MARY F. MORIARTY

October 19, 1987

PERSONAL AND CONFIDENTIAL

William R. Kennedy
Chief Public Defender
Hennepin County
C-2200 Government Center
Minneapolis, MN 55487-0520

Re: October, 1987, Complaint against [redacted]

Dear Mr. Kennedy:

By copy of this letter I am forwarding your complaint against [redacted], received here October 12, to Julius Gernes. Since the complaint concerned the review process, and Mr. Gernes was the reviewing Board member in the matter, he will consider it.

I believe your complaint mis-conceives the process provided for "Review by Lawyers Board" under Rule 8(d), Rules on Lawyers Professional Responsibility (RLPR). When this Office investigates a complaint, the complainant has no right to be informed of the contents of the file, nor is it required that the respondent attorney's submission to this Office be shared with the complainant. Indeed, under Rule 20, RLPR, the file is confidential and may not be disclosed to the complainant, except for such purposes as facilitating the investigation and keeping "the complainant advised of the progress of the proceedings," under Rule 7 and 8, RLPR.

When a complainant is dissatisfied with the Director's disposition, and requests a Board member to review that decision, the complainant ordinarily does not know the contents of the file being reviewed by the Board member, quite aside from any additional materials the respondent may submit. In this respect, the Board's review is fundamentally unlike the trial and appellate analogies cited in your complaint. The Court has often stated that professional responsibility proceedings are not a contest between parties but an inquiry into the fitness of one of the Court's officers.

When the Board member reviews the matter, he or she is not acting so much like a judge as like one who stands in the Director's shoes. Thus, although the Board member makes a decision upon a

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particular file, the decision-making is like that of the Director (who routinely receives communications not shared with complainants) and unlike the decision-making of a judge (or jury) who have before them only files and evidence available to both parties.

Please reconsider your view in light of a situation like the following. Suppose that a client complained against an attorney; that the complaint was summarily dismissed by the Director without investigation and the client was notified of Rule 8(d) rights; and that the attorney wished to inform both the Director and the reviewing Board member of some fact or argument--for example, that the complainant was committed or incarcerated or not credible for some obvious reason, or that the subject matter of the complaint was for some reason beyond professional responsibility jurisdiction. If the respondent attorney made such a communication to the Director and Board member, without copying the complainant, I would not regard that as an improper communication. I hope that, on reflection, you would agree with this view.

Although the question of appropriate communications to a reviewing Board member has not arisen frequently, it has been handled consistent with the point of view stated above. Because the views of proper Rule 8(d) procedures stated in your current complaint vary from those used by this Office and the Board in the past, I am sharing your complaint and this letter with the Board Executive Committee.

Very truly yours,

William J. Wernz
Director

WJW:ma
cc: Julius E. Gernes
[redacted]
Lawyers Board Executive Committee

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OFFICE OF
LAWYERS PROFESSIONAL RESPONSIBILITY
520 LAFAYETTE ROAD
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ST. PAUL, MINNESOTA 55155-4196
612-296-3952

DIRECTOR
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MARTIN A. COLE
BETTY M. SHAW
WENDY WILLSON LEGGE
MARY F. MORIARTY

January 22, 1988

Mr. William R. Kennedy
Chief Public Defender
C-2300 Government Center
Minneapolis, MN 55487

Re: The October 12, 1987, Complaint of William R. Kennedy against [redacted], an Attorney at Law of the State of Minnesota.

Dear Mr. Kennedy:

Pursuant to your January 21 letter, I am enclosing a copy of the December 7, 1987, determination in the above-entitled matter.

I believe that the determination was mailed to you in the same envelope as the December 7 letters to you regarding two other complaints (Board's Response to Petitions, A.58 and A.80). If you did not receive actual notice of the October 12, 1987, determination and wish to appeal, please notify me within two weeks of the date of this letter and I will forward the matter to our Board for appropriate action.

Very truly yours,

William J. Wernz
Director

By _____
Thomas C. Vasaly
First Assistant Director

TCV:ma
Enclosure
cc: [redacted]

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- - - - - - - - - - - - - - - - - -

In the Matter of the Complaint of
WILLIAM R. KENNEDY
Chief Public Defender
C-2300 Government Center
Minneapolis, MN 55487
against [redacted],
an Attorney at Law of the
State of Minnesota.

- - - - - - - - - - - - - - - - - -

DETERMINATION THAT DISCIPLINE IS NOT WARRANTED PURSUANT TO RULE 8(c)(1), RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

TO: Complainant and the Respondent Attorney Above-Named:

Based upon the entire file the Director of the Office of Lawyers Professional Responsibility hereby determines that discipline is not warranted. A memorandum stating the basis for the determination is attached.

NOTICE OF COMPLAINANT'S RIGHT TO APPEAL

If the complainant is not satisfied with this decision, an appeal may be made by notifying the undersigned in writing within fourteen (14) days of this notice. An appealed decision will be reviewed by a designated Lawyers Professional Responsibility Board member, whose options are limited to (1) approving this decision, (2) directing that the case be submitted to a hearing panel, or (3) requiring further investigation. This determination will generally be based upon the information which is already contained in the file.

Dated: Dec. 7, 1987.

WILLIAM J. WERNZ
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY
520 Lafayette Road, 1st Floor
St. Paul, MN 55155-4196
(612) 296-3952

By _____
THOMAS C. VASALY
FIRST ASSISTANT DIRECTOR

WJW/TCV/lab

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MEMORANDUM

Complainant appealed from the Director's determination that a prior complaint against respondent did not warrant discipline. In support of his position, respondent sent two letters to the panel member assigned to hear the appeal without sending copies of the letters to complainant or his attorney until the panel member brought the matter to respondent's attention. Complainant then filed the present complaint alleging violation of the ethical rules prohibiting ex parte communications in an adversary proceeding.

Neither the Rules on Lawyers Professional Responsibility nor any policy promulgated by the Lawyers Professional Responsibility Board indicates whether a panel member reviewing a determination by the Director under Rule 8(d), RLPR, is to be viewed in an adjudicatory role (in which case ex parte communications are limited by Rule 3.5(g), MRPC, and Rule 29, RLPR) or in the role of a substitute Director reviewing an investigation (in which case Rule 3.5(g), MRPC, and Rule 29, RLPR, do not apply). Complainant assumed it was the former and respondent assumed it was the latter. The Director's office will not attempt to resolve this question in the present context. Given the fact that no policy resolving this question had been communicated to the respondent, it cannot be concluded that respondent's assumption was less reasonable than complainant's.

T.C.V.

DATE: April 29, 1988

TO: William R. Kennedy

FROM: John Lucas

SUBJECT: CONFLICTS OF INTEREST - IMPUTED DISQUALIFICATION

Clearly, the Director's perception of imputed disqualification flies directly in the face of established law. Most decisions around the country prohibit conflicting representations by a public defender office by treating it as a private firm would be treated for conflict purposes. Rodriguez v. State, 129 Ariz. 67, 628 P.2d 950 (1981) (holding that the appearance of impropriety mandated the public defender's office to withdraw from representation); Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974) (holding that even though different members of the public defender's staff were representing the two defendants, the knowledge, or position gained by any member of the staff would be attributed to the other); Bailey v. State of Delaware, No. 292, 1986, 518 A.2d 91 (Table) (Del. Oct. 29, 1986) (text in Westlaw) (holding that the disability of trial counsel under Rule 1.7 extends to the other lawyers in the "firm" -- the office of the Public Defender); Turner v. State, 340 So. 2d 132 (Fla. Dist. Ct. App. 1976) (holding that the public defender's office is a "firm" within the canons of the Florida Code of Professional Responsibility pertaining to conflicting interests in representation); State v. Bell, 90 N.J. 163, 447 A.2d 525 (1982) (holding

that rule governing situations in which potential conflict of interest arises from multiple representation would henceforth be followed when multiple defendants are represented by separate deputy public defenders from same office); Ethics Advisory Opinion 85-16, South Carolina Ethics Committee (undated) (disqualification of one lawyer in the public defender's office from representing a client disqualifies all the other lawyers in that office from that representation).

Some jurisdictions appear to go even further and absolutely prohibit joint representation by a public defender office. Commonwealth v. Westbrook, 484 Pa. 534, 400 A.2d 160 (1979). Protection of client confidentiality is an important consideration in public defender cases, and other interests are also at stake. For a familiar example, if a public defender is confronted with the need to argue that another member of the same office represented an accused in a constitutionally ineffective way in a prior proceeding, the natural instinct to protect the reputation of a colleague, and perhaps of a friend, make the representation thoroughly conflicting. Angarano v. United States, 329 A.2d 453 (D.C. App. 1974)

Legal aid societies and similar public service offices have been held, for the purposes of determining whether there were conflicts of interest, to be similar to a private law firm. Estep v. Johnson, 383 F. Supp. 1323 (D. Conn. 1974); State v. Stevenson, 200 Neb. 624, 264 N.W.2d 848

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(1978). Particularly instructive is the language in Borden v. Borden, 277 A.2d 89 (D.C. App. 1971) (a divorce suit holding that representation of adverse interests by members of the same legal aid office was improper). In Borden, the court found that "Lawyers who practice their profession side-by-side, literally and figuratively, are subject to subtle influences that may well affect their professional judgment and loyalty to their clients, even though they are not faced with the more easily recognized economic conflict of interest." Id. at 91. The court concluded that it was

> "reluctant to ever make an exception from the professional norm for attorneys employed by the government . . . because then we might encourage a misapprehension that the special nature of such representation justifies departure from the profession's standards. We should always avoid any action that would give the appearance that government attorneys [footnote - indicating that this included the public defender - omitted] are 'legal Hessians' hired 'to do a job' rather than attorneys at law.

Id. at 92-93.

The highest consideration we face is the accused's due process right to conflict-free representation. The focus must be on the citizen's right, not upon the expediency enjoyed by the court system. The Director certainly does not suggest an abrogation of this right for those who retain private counsel. Despite efforts to the contrary, due process rights inhere in the poor and affluent alike.

An arguably different case has been presented where the public defenders, although employed by the same agency, operate from physically separated offices. Babb v. Edwards,

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412 So.2d 859 (Fla. 1982) (under Florida statute, public defender has discretion to determine whether representation by public defender in another county of same judicial district, with separate office, facilities, and personnel will sufficiently insulate offices to permit another public defender to represent a co-defendant or whether appointment of private practice lawyer is required). The court in People f. Robinson, 79 Ill. 2d 147, 37 Ill. Dec. 267, 402 N.E.2d 157 (1979), reasoned that public defenders should be treated as a law firm for conflict purposes, but failed to adopt a per se rule, with the wide divergence in the organization of the various public defender offices. Some offices exist in name only in Illinois, truly consisting of private attorneys appointed or volunteered.

This brings forward a second consideration - cost and effectiveness. In order to achieve the desired physical separation described in Babb and Robinson would require a total dismantling and restructuring of the public defenders offices. The current relationship, whereby the lawyers share the same filing systems, computers, support personnel, etc., would be woefully inadequate. Not only would the costs be staggering, but the general pooled-resources benefit would be destroyed, diminishing the overall quality of representation of our clients. The obvious practicality of considering a public defenders office a "firm" for conflict purposes is further highlighted by the fact that private solo practice attorneys in office-sharing

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arrangements have been treated as partners for the purposes of the imputed disqualification rules. In re Opinion No. 415, 81 N.J. 318, 407 A.2d 1197 (1979); In re Smith, 289 Or. 501, 614 P.2d 1136 (1980).

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RULE 30. COMPLAINTS AGAINST DIRECTOR AND BOARD

(a) Complaint. A complaint against the Director or his staff or the Board or an individual member of the Board shall be referred to the Chief Judge of the Minnesota Court of Appeals. If the complaint alleges:

(1) a violation of state or federal law or regulation; or

(2) a violation of the Rules of Professional Conduct; or,

(3) a violation of the Rules On Lawyers Professional Responsibility; or,

(4) improper or discriminatory administration of the Rules of Professional Conduct or Lawyers Professional Responsibility,

the Chief Judge shall appoint an Investigator who shall inquire into the complaint and report to the Chief Judge whether there are reasonable grounds to believe that

(i) a violation of law or the Rules or improper administration of the Rules has occurred, and,

(ii) the lawyer or Board member complained against has committed the violation.

If reasonable grounds do not exist, the complaint shall be dismissed without prejudice.

(b) Investigation. If reasonable grounds pursuant to (a)(i) and (ii) exist, the complaint shall be investigated by the Investigator previously appointed. If after investigation, the Investigator concludes that discipline is

not warranted, s/he shall so report to the Chief Judge of the Court of Appeals who shall dismiss the complaint. If after investigation the Investigator concludes that discipline or other legal action is warranted, s/he shall so notify the Chief Judge of the Court of Appeals.

(c) Disposition. In cases where discipline is warranted, the Chief Judge of the Court of Appeals shall so notify the Supreme Court. In cases where it is found that the Directors Office and/or the Board or individual members of the Directors Office or the Board have violated any state or federal law, or violated any person's rights, or administered the Rules in a discriminatory manner, the Chief Judge shall notify the Attorney Generals Office which shall forthwith conduct its own investigation and determine if there is any civil or criminal liability and if so, proceed to prosecute accordingly.

(d) Supreme Court. When the Supreme Court has been notified in writing that discipline is warranted against the Director's Office or Board, or any individual member of the Director's Office or Board, it shall conduct a hearing on the question as to what discipline, if any, is appropriate. Members of the profession and public shall be heard. If the court concludes, after hearing, that discipline is not warranted, it shall state in writing its reasons for so holding. If the Court concludes after hearing that discipline is warranted, it shall state in writing why, and what sanctions it imposes.

(e) Forfeiture. Any member of the Director's Office or the Board who shall be publicly disciplined by the Court shall, in addition to any other sanction imposed by the Court, forfeit their employment or appointment, and shall not be eligible for any future State or Court employment or appointment for a period of five years.

RULE 31. PENDING MATTERS

(a) Authority. Except as hereinafter specified, Neither the Director's Office nor the Board shall have authority to intervene or interfere in any pending matter. No complaint alleging improper conduct in a pending matter shall issue against any lawyer involved in that pending matter. Failure of the Directors Office or the Board to comply with this rule shall be grounds for discipline.

(b) Intervention. Standards. Affidavit. If a clear and present danger to the fair administration of Justice exists and there is no adequate remedy at law or judicial remedy, the Director's Office or the Board may issue a complaint alleging improper conduct by a lawyer involved in a pending matter provided the following conditions are met:

(1) The Director shall petition the Chief Judge of the Court of Appeals for an order authorizing the Director to issue a complaint against a lawyer involved in a pending matter if:

(a) the alleged improper conduct constitutes a clear and present danger to the fair administration of Justice, and,

(b) there is no adequate remedy at law or judicial remedy to deal with the alleged improper conduct, and,

(c) but for the intervention of the Director or Board an injustice will result, and,

(d) the petition shall be under oath, signed by the Director, and shall state with particularity those facts giving rise to reasonable grounds to believe that improper conduct has occurred and that the lawyer complained against has allegedly engaged in improper conduct within the meaning of the Rules. The petition shall also state with particularity those facts that give rise to reasonable grounds to believe that conditions in (b)(1)(a)(b)(c) and (d) have been met.

(2) Court of Appeals. The Chief Judge of the Court of Appeals, or his designee from the Court, shall hear the petition. Said hearing shall be confidential but be reported. A transcript shall be made and filed with the Court of Appeals. Said filing shall be confidential unless otherwise ordered by the Court.

(3) Findings. The Chief Judge or his designee shall make specific findings of fact and conclusions of law and enter its order either allowing the Director to intervene in a pending matter or dismissing the Director's petition and denying permission to intervene in pending litigation.

(4) Burden of Proof. The Director shall have the burden of proving, by clear and convincing evidence, each and every allegation in his petition.

(5) Investigation. The Director shall report to the Chief Judge within three (3) days whether there is reasonable grounds to believe that an investigation must go forward. If the Chief Judge finds reasonable grounds he shall order the investigation to continue under supervision by the Court of Appeals.

(6) Aggrieved Party. If a party to the proceeding subject to intervention by the Director is aggrieved, that party may request a hearing before the Chief Judge of the Court of Appeals who, after hearing, may, subject to constitutional limitations, and in the interests of Justice, order the trial or other hearing stayed until the investigation has been completed.

RULE 32. CONFLICTS OF INTEREST. DIRECTOR'S OFFICE. BOARD.

Notwithstanding any policy to the contrary, any complaint alleging conflicts of interest by the Director's

Office or any member thereof, or by the Board or any member thereof, shall be heard in the manner provided by Rule 30.

RULE 33. TRAINING. STANDARDS. DIRECTOR'S OFFICE. BOARD.

(a) Training. The Director and his assistants shall undergo two weeks of specialized training each year in the field of trial law. Such course of training shall emphasize the trial of civil and criminal cases and include, inter alia, intensive instruction on the Constitution and the Bill of Rights. Board members shall be required to take the same course of instruction.

(b) Standards. Minimum standards of performance shall be developed to determine the quality of performance of each member of the Director's Office and the Board. Said standards shall be adopted by the Supreme Court after a public hearing on the matter.

4.25.88

ROBERT R. BIGLOW
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April 22, 1988

C1-84-2140

OFFICE OF
APPELLATE COURTS

APR 25 1988

FILED

Justices of The Minnesota State
Supreme Court
230 State Capitol Building
St. Paul, Minnesota 55155

Re: Conflict of Interest Rules

Dear Justices:

Please accept this letter as our response to the opinion of the Director of the Board of Professional Responsibility that the rules regarding conflicts of interest do not apply to attorneys in a public defender's office.

We believe that this decision will have adverse consequences on both the public's and the defendant's view of the public defender's office and attorneys in general.

The impression we get from clients in our criminal practice is that there are a significant number of defendants who do not have faith in representation by a public defender. The public defender is generally viewed as a busy agent of the State, with little time to spend on each client.

A rule that would allow two attorneys in the same office with the same employer to represent two defendants with conflicts of interest would foster this distrust.

In the co-defendant setting, a primary fear of each defendant is that the other will be offered a deal in exchange for testimony that will insure his or her conviction.

If the co-defendants are represented by attorneys from the same office, the defendant who does not get the plea offer will likely feel that the unfavorable result is a product of the attorney's tacit collusion.

The same scenario is evident in Juvenile Court. Commonly, the parents and the child have conflicting interests in a parental termination or dependency and neglect proceeding. The question that arises is, will the parent be comfortable knowing that his or her attorney is an associate of the attorney for the child? The answer clearly is no. This is especially true if there are allegations of abuse.

If the child alleges that he or she has been physically or sexually abused by the parent, then the child's attorney must bring those facts before the Court. Yet that kind of forceful advocacy will undoubtedly trigger a criminal prosecution. The question that arises now is whether the indigent parent will want the representation of a public defender. Clearly the answer again is no.

We must also be mindful of the public's perception of the legal system. A rule allowing public defenders to represent clients with competing interests will be viewed as a cost cutting measure at the expense of the poor. Those who can afford a private attorney will have representation without fear of there being a conflict of interest. Those who cannot afford a private attorney will always be in fear of a conflict situation.

How do we as members of the Bar respond to such issues? Do we answer by stating: Well it does not appear proper but we have to rely on the fact that these attorneys are professionals and will always do what is in their client's best interests? Such an answer is not satisfactory. We have to recognize that when attorneys work in association in the same office with access to each others files and investigation, real conflicts arise. They arise when they represent clients with competing interests. This is as true in the criminal and juvenile arenas as in the civil arena.

Respectfully Submitted,

Robert R. Biglow

Michael J. Biglow

Mark W. Biglow

Eileen T. Biglow-Bergmann

RRB:eb

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March 9, 1988

Office of Appellate Courts
230 State Capitol
St. Paul, MN 55155

Re: In Re Petition of the Lawyers Professional Responsibility Board to Amend the Minnesota Rules on Lawyers Professional Responsibility.
File No. C1-84-2140.

Dear Clerk:

Pursuant to the Court's February 17, 1988, order in the above matter, please find enclosed the original and ten copies of the statement in support of rule amendments proposed by the Lawyers Professional Responsibility Board. Please also find enclosed the original and ten copies of a request to make oral presentation at the May 12, 1988, public hearing in the above matter.

Very truly yours,

William J. Wernz
Director

WJW:KLJ:ma
Enclosures
cc: Honorable Glenn E. Kelley
John D. Levine

FILE NO. C1-84-2140

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition of the Lawyers Professional Responsibility Board to Amend the Minnesota Rules on Lawyers Professional Responsibility	REQUEST TO MAKE ORAL PRESENTATION TO THE MINNESOTA SUPREME COURT

TO THE MINNESOTA SUPREME COURT:

Pursuant to the Court's February 17, 1988, Order for Public Hearing, the Lawyers Professional Responsibility Board hereby requests that a representative of the Board be permitted to make an oral presentation at the May 12, 1988, public hearing in the above matter. Ten copies of a statement in support of the rule amendments proposed by the Lawyers Professional Responsibility Board are filed herewith.

Dated: March 9, 1988.

Respectfully submitted,

LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

By Wm. J. Wernz

WILLIAM J. WERNZ
DIRECTOR OF THE OFFICE OF LAWYERS
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520 Lafayette Road, 1st Floor
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FILE NO. C1-84-2140

STATE OF MINNESOTA

IN SUPREME COURT

- - - - - - - - - - - - - - - - - -
In Re Petition to Amend the Minnesota Rules on Lawyers Professional Responsibility.
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STATEMENT IN SUPPORT OF RULE AMENDMENTS PROPOSED BY THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

INTRODUCTION

In an effort to facilitate continued improvement in the Minnesota lawyer professional responsibility system, a Lawyers Board Rules Committee (Rules Committee) was appointed in 1987 to study and consider proposed changes to the Rules on Lawyers Professional Responsibility and the Minnesota Rules of Professional Conduct. The Rules Committee studied a number of proposals for rule changes and made recommendations to the Lawyers Board for changes in the Rules on Lawyers Professional Responsibility. The Lawyers Board approved certain of the recommendations and filed with the Court a January 27, 1988, petition to amend the rules. This statement is submitted in support of the proposed rule amendments.

I. AMENDMENTS TO RULE 4(f)

A. Use of District Ethics Committee Member Expertise in Probable Cause Panel Hearings.

The practice of law is becoming increasingly specialized. Rule 4(f) was amended at the recommendation of the Supreme Court Advisory Committee to allow reassignment of members of a Lawyers Board Panel to utilize Board member expertise. To the extent possible, the lawyer members appointed to the Board reflect a "broad cross section of areas of practice." Rule 4(a)(2). Due

to increasing specialization, however, there can be no assurance that all areas of practice will be represented by the Board's lawyer members. Therefore, the Executive Committee should, where it becomes necessary, have the ability to utilize the expertise of district ethics committee members if a particular area of law is not represented on the Board.

B. Assignment of Appeals of Multiple Admonitions Issued to the Same Lawyer to the Same Panel for Hearing.

Admonitions are issued where the lawyer's conduct is "unprofessional but of an isolated and non-serious nature." Rule 8(c)(2). Appeals of admonitions are heard by Lawyers Board Panels and require the presence of three Board members. Because admonitions are issued for isolated and non-serious misconduct, these hearings generally do not involve complex matters and can be heard and decided within a few hours.

Occasionally, multiple admonitions are issued to a lawyer. If the lawyer appeals those admonitions, Rule 4(f) currently requires that the appeals be assigned to panels in rotation. Assignment by rotation rarely results in multiple admonition appeals being assigned to the same panel. The different panels will normally be unaware of the pendency of the other matters affecting the same attorney; for instance, two or more allegations of neglect may be dealt with entirely separately. At all other levels of discipline procedures (district committees, Director's office, referee, Supreme Court), the persons reviewing the lawyer's conduct will normally be aware of multiple pending matters. Therefore, the Executive Committee should have the ability to assign appeals of multiple admonitions issued to the same lawyer to the same panel for hearing.

II. RULE 8 - COMPLAINTS BY CRIMINAL DEFENDANTS AGAINST DEFENSE COUNSEL AND APPEALS OF DISMISSALS OF SUCH COMPLAINTS

When criminal charges are pending, complaints by criminal defendants alleging inadequate representation by their counsel have in recent months generally been dismissed without investigation. In previous years such complaints normally were investigated, if they alleged unprofessional conduct. Post-conviction complaints of unprofessional conduct almost always have been dismissed if there was post-conviction judicial relief which could be sought. See form paragraph SD-8, SD-9 and SD-12 (A. 1), currently used by the Director's office to summarily dismiss such complaints.

For several reasons, the Lawyers Board now recommends that a rule be adopted so that no complaints by criminal defendants of ineffective assistance of counsel are investigated while criminal charges are pending. First, the number of these complaints investigated in previous years and resulting in discipline has been low. When discipline has been imposed it has usually been no more than an admonition, often for inadequate communication.

Second, the rule change also seems appropriate because it is believed that the court system can and does provide some review of defense counsel. The Sixth Amendment requires the trial court to insure that criminal defendants are provided with effective assistance of counsel. Accordingly, complaints alleging inadequate representation by defense counsel should be directed to the chief district judge or the trial court. If the trial court believes there is merit to the defendant's allegations, it can (1) appoint new counsel; (2) conduct its own investigation;

or (3) refer the matter to the Director's office for investigation.

Third, the rule change appears desirable to avoid manipulation of the professional responsibility system that could result in prejudice in the criminal justice system. Disciplinary investigations could potentially delay or prejudice pending criminal proceedings. Indeed, it appears that some defendants may have filed ethics complaints as a means of disqualifying an individual public defender. Accordingly, investigations concerning inadequate representation allegations by criminal defendants should be initiated during the pendency of criminal proceedings only where an independent source (e.g., a judge or another lawyer) also questions the adequacy of the representation.

Dismissals of complaints by criminal defendants will be without prejudice. When charges are no longer pending and any available post-conviction remedies have been exhausted, the defendant may re-submit the complaint. If the complaint then states a basis for a reasonable belief that a rule may have been violated, an investigation will be undertaken.

If proposed Rule 8(b) concerning complaints by criminal defendants is adopted, the Director will routinely dismiss such complaints without investigation or consideration. Thereafter, appeal of such matters to a Board member for review would be superfluous since the matter will never be considered by the Director in the first instance. The complainant appeal provision of Rule 8 should be amended to provide that a dismissal of a complaint under proposed Rule 8(b) cannot be appealed to a Board member for review.

The proposed Rule amendment was recommended by a Board Committee with members experienced in the criminal law. The Committee was informed that the practice of some other states is divided--some follow the practice of treating criminal law complaints as the Board had done previously; other states do roughly as the rule amendment would prescribe.

III. RULE 13(b) - REPEAL OF CONDITIONAL ADMISSION RULE

The Lawyers Board believes that Rule 13(b) (Conditional Admission Rule) is fundamentally inconsistent with the purpose of lawyer discipline proceedings. Lawyer discipline proceedings constitute an inquiry into the lawyer's fitness and oftentimes includes examination of qualities such as honesty and trustworthiness. Similarly, Rule 25 requires the lawyer's cooperation with disciplinary investigations. Cooperation presumably includes candid responses to disciplinary inquiries. If a lawyer denies allegations in a Rule 25 response, but later conditionally admits the same allegations in answering the petition for disciplinary action, there is the appearance and possibility that the Rule 25 response was false.

The Lawyers Board distinguishes the conditional admission rule from the accepted "plea bargaining" practice in criminal matters. Criminal defendants normally do not testify at trial, thereby rendering the probability of inconsistent statements more remote. Moreover, criminal defendants are not certified by the court as "trustworthy" professionals. Finally, there are, for many good reasons, more constitutional restrictions upon the "search for truth" in criminal proceedings than there are in disciplinary proceedings.

There is also the prospect of a tainted proceeding if the court rejects a conditional admission. This occurs because the referee and the court are aware that the respondent has conditionally admitted allegations in the petition. Accordingly, it could be difficult even for judges to prescind from that admission and consider the allegation solely on the basis of the evidence.

Repeal of the conditional admission rule will not prevent or hinder settlement of disciplinary cases. The Director will still be able to enter into stipulations for discipline with attorneys provided the parties are in agreement upon the appropriate discipline. In 1987, seventeen public disciplinary matters were resolved by stipulation and without the use of Rule 13(b).

IV. AMENDMENT TO RULE 14 REQUIRING CERTIFICATE AS TO TRANSCRIPT

Rule 14(e) requires that a transcript of the referee hearing must be prepared in order to contest the referee's findings of fact or conclusions. The party ordering the transcript is responsible for making satisfactory financial arrangements with the court reporter for the transcription. Although the transcript must be ordered within five days of the filing of the referee's findings and conclusions, Rule 14(e) provides no deadline as to when satisfactory financial arrangements must be made with the court reporter. Most, if not all, court reporters will not begin work on the transcript until satisfactory financial arrangements have been made. Consequently attorneys can, and have, caused delay in public disciplinary proceedings by failing to make satisfactory financial arrangements with the court reporter for the transcription. Therefore, Rule 14(e)

should require the filing of a certificate as to transcript signed by the court reporter within ten days of the date the transcript was ordered. The proposed amendment to Rule 14(e) parallels the procedure required by Rule 110.02(2) of the Minnesota Rules of Civil Appellate Procedure.

V. AMENDMENTS TO RULE 20(d)

A. Application for Retention to Panel Chair Instead of Panels.

Under Rule 20, all records of a dismissed complaint are destroyed three years after the date of the dismissal. Rule 20(d)(2) currently provides that the Director may retain records of a dismissed complaint beyond three years after the dismissal by making application to a panel and demonstrating good cause for retention of the records. The respondent attorney also has an opportunity to be heard before the panel. Determining whether records of a dismissed complaint should be retained does not require consideration by an entire panel. A determination under Rule 20(d)(2) only prevents the records of a dismissed complaint from being destroyed. The admissibility of such records in a subsequent disciplinary proceeding is governed by Rule 19(b)(1). Moreover, the retained records may not be disclosed to an outside person, office or agency without the lawyer's consent. See Rule 20(b). Therefore Rule 20(d)(2) should be amended to allow the Director to apply to a panel chair, rather than a panel to obtain permission to retain records of a dismissed complaint beyond three years.

B. Repeal of Applications for Further Retention.

Since the expunction procedures were adopted by the Supreme Court in 1983 there has never been a second application by the Director for further retention of records for which a previous

application had been granted. If good cause is shown, the retention period should be extended no longer than is necessary to serve the purpose for which the records were retained. If such purpose cannot be accomplished within three years, it is highly unlikely that "good cause" exists for further retention beyond the additional three years. The last paragraph of Rule 20(d) which permits the Director to make a second application for further retention of records of dismissed complaints should be eliminated.

VI. RULE 28 - ASSERTING DISABILITY DURING DISCIPLINARY PROCEEDINGS

A lawyer who has been adjudicated as a mentally ill, mentally deficient, incapacitated or inebriate person is incapable in assisting in the defense of a disciplinary proceeding and should be immediately transferred to disability inactive status. "Incapacitated person" is defined by Minn. Stat. § 425.45, subds. 2 and 3 and should be included as an adjudicated illness requiring immediate transfer.

The protection of the public requires that claims of disability asserted by lawyers (who have not been adjudicated as mentally ill or deficient, incapacitated or inebriate) during disciplinary proceedings be more closely scrutinized. The current rule does not identify procedural options when a lawyer asserts disability either during panel proceedings or before panel proceedings. When a lawyer asserts disability during a disciplinary proceeding, the court and the referee should have a spectrum of identified options to deal with disability claims. Under Rule 15 the Court has both general discretion and a spectrum of identified options for final disposition. The Court

and the referees should have similar discretion and options available for addressing disability claims.

The current rule also requires that counsel "shall" be appointed for a lawyer who the Director seeks to transfer to or from disability inactive status. The rule appears to be unilateral and conceivably could cause the appointment of an attorney, perhaps at the Director's expense, even though the lawyer has funds to hire an attorney. Accordingly, the rules should be amended to state that counsel "may" be appointed.

Dated: March 9, 1988

Respectfully submitted,

LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

JOHN D. LEVINE
CHAIRMAN

OFFICE OF LAWYERS PROFESSIONAL
RESPONSIBILITY

WILLIAM J. WERNZ
DIRECTOR

HSD-8

This complaint basically alleges that the attorney did not adequately represent a criminal defendant. Ineffective assistance of counsel claims are best raised in a post-conviction proceeding, as provided under Minn. Stat. §§ 590.01-.06, or by appeal, or through the federal courts, or through other post-conviction remedies. Courts presume that attorneys' conduct falls within "the wide range of reasonable professional assistance." Strickland v. Washington, 104 S. Ct. 2052 (1984). The Minnesota Supreme Court, to which this Office is accountable, in 1986 adopted the recommendation of its Advisory Committee that this Office should not normally be involved in post-conviction claims of ineffective assistance of counsel unless a court first finds impropriety.

HSD-9

The Lawyers Professional Responsibility Board has adopted a policy of summarily dismissing complaints by criminal defendants that their attorneys are providing inadequate representation. Such complaints may be submitted by the defendant to the trial judge or chief district court judge. If appropriate, the judge may refer the matter back to this Office for investigation. When criminal proceedings are no longer pending, the defendant may also re-submit the complaint to this Office.

HSD-12

NOTICE OF COMPLAINANT'S RIGHT TO APPEAL

If the complainant is not satisfied with this decision, an appeal may be made by notifying the Director in writing within fourteen (14) days of this notice. An appealed decision will be reviewed by a designated Lawyers Professional Responsibility Board member, whose options are limited to (1) approving this decision, (2) directing that the case be submitted to a hearing panel, or (3) requiring further investigation. This determination will generally be based upon the information which is already contained in the file.

STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2140

Petition of the Lawyers Professional Responsibility Board to Amend Minnesota Rules on Lawyers Professional Responsibility

PERSONAL STATEMENT OF JACK NORDBY

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STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2140

Petition of the Lawyers Professional Responsibility Board to Amend Minnesota Rules on Lawyers Professional Responsibility

PERSONAL STATEMENT OF JACK NORDBY

My Interest and Standing

My name is Jack Nordby. I have been a member of the bar of this Court since 1967, presently practicing with Meshbesher, Singer & Spence, Ltd. I graduated from Windom, Minnesota, High School (1959), Harvard College, Cambridge Massachusetts (A.B., Magna Cum Laude, 1964), and Harvard Law School (L.LB, 1967), and studied at the University of Minnesota Graduate Department of English in 1967-1968. I am admitted to the U.S. Supreme Court and the U.S. Courts of Appeals for the Second, Fourth, Fifth, Eighth and Tenth Circuits, and have tried and appealed cases in numerous state courts. I am listed in Who's Who in American Law, The Best Lawyers in America, Who's Who in the Midwest and The National Directory of Criminal Lawyers.

Because my practice now consists largely of defending lawyers, judges and, to a lesser degree, other professionals in disciplinary and licensing proceedings, I have an immediate and continuing interest in the Rules. I emphasize, however, that the

views about to be expressed are my own, and not necessarily those of my clients or law firm. Because I go appreciably beyond the specific issues raised by the petition, the Court deserves to know the basis of my concerns.

The more specific credentials, such as they are, which embolden me to presume to address the Court, and which also display my biases, include the following, (whether I am entitled to be heard because of my activities and publications or in spite of them is for others to judge):

1) Publications. I have published a large number of articles, almost all on questions of legal and judicial ethics, contempt and other sanctions, constitutional and criminal law, and appellate practice. For present purposes I mention two: First, my article, "The Burdened Privilege: Defending Lawyers in Disciplinary Proceedings," 30 So.Car.L.Rev. 363-453 (1979) remains so far as I am aware the lengthiest and most heavily footnoted discussion of the specific subject in its title; Second, I have nearly completed a treatise (of approximately 1000 pages), on both substantive ethics and disciplinary procedure, under contract to the Matthew Bender Company (but completion has been obstructed by the American Bar Association's assertion of copyright over their Code, Model Rules, and Opinions). I mention this because the research has required me to read virtually all the opinions and literature on the subject.

2) Teaching. I have taught full courses in Professional Responsibility at Hamline Law School (1983) and William Mitchell College of Law (1987), have been a guest lecturer for a number of professors, and have been on the faculties (and written often quite extensive papers for) a great many seminars sponsored by various Minnesota agencies as well as several national organizations including several for the ABA, the American Judicature Society, the National Association of Criminal Defense Lawyers, among others.

3) Practice. Although I have not counted them, I have either formally represented or counseled a large number of lawyers, certainly hundreds, on questions of ethics or discipline, a substantial but much smaller number of judges (state and federal), a considerable number of professionals in other areas, as well as numerous law students, teachers and bar applicants. I have testified as an expert witness on legal and judicial ethics and malpractice, and I testified on request before the Dreher committee, the committee which evaluted the Hennepin County District Ethics Committee, and the committee of the Board which evaluated publicity policies. Although most of my work has been defense, I have also produced advisory opinions, preventive advice, and on a number of occasions have assisted or advised persons in making complaints against lawyers.

4) Motivation. None of the foregoing entirely explains or justifies my desire to effect changes in the rules, and my motivation is more than a practitioner's technical interest.

Although I am unable to articulate this adequately, my surpassing concern is inspired by case after case of witnessing the agony of lawyers (and their families and colleagues) who are caught up in the disciplinary system -- a system which in my considered judgment too frequently humiliates, enrages, demeans and destroys the spirit, the will to continue practicing law, and, on many more than one occasion, literally the will to go on living. Some of these cases are so painful to observe, and my sense of my own inadequacy to deal with them so vivid and acute, that I have often considered changing the nature of my practice if I were able. The work I do is on some rare occasion satisfying or even rewarding, but never enjoyable, never pleasant, never -- or so it seems -- quite worth the cost.

I yield to no one -- not the Director, not the Board, not (respectfully) even this Court -- in devotion to the principle that lawyers must be competent, loyal, courageous, and honorable. But I do object to (because I have seen the unnecessary carnage of) the unfortunate notion that professional discipline is in a significant degree a public relations vehicle. We are demonstrably the most rigorously and effectively regulated profession anywhere, perhaps in history. Yet by making the intitial and pervasive error of claiming some special importance in society, and for this hubris quite rightly receiving vociferous criticism for disclosed foibles, we react self-destructively on the internecine theory that <u>more public discipline</u>, disgracing lawyers, we will create public <u>confidence</u> in and respect for the profession.

As the most recent example of this institutional myopia, I am reminded of the ABA's Stanley Report which began with the bar's self-congratulatory observation that some 33 lawyers were among those assembled in Philadelphia in 1787 who, they say, created the greatest document in the history of human liberty. This, of course, overlooks the fact that that document made black women and men chattels, that it took a war, several amendments and nearly a century to make them citizens, that even today equality is often illusory. This is not to say the founders were evil, or the Constitution was or is a bad document; on the contrary, I worship them and it. The point is simply that the leading spokesmen for our profession today can sometimes be so officiously and unnecessarily self-righteous. If we as a profession would simply admit we are a segment of society, privileged perhaps to be more educated and affluent than many, but no more inherently important or virtuous or indispensible than others, just citizens answerable for our errors like many other citizens, deserving now and then of credit for individual or institutional accomplishment -- mere mortals, in other words, doing a job of work to make ends meet as best we can -- if we would not arrogate to ourselves some imagined transcendence, the public perception of us would perforce be to a degree thereby improved.

The bench and bar by definition can never be popular, and should never seek to be, ours is an adversary system in which someone -- quote often everyone in a given dispute -- loses. We

protect the minority, even one person against all the world -- and he who would do that must renounce the need for popularity, the addiction to applause, the aversion to criticism and condemnation. We need not, must not, sacrifice perhaps imperfect but redeemable lawyers on the altar of public popularity, but rather always have the courage and humility to treat individual cases individually (as we claim to do), without thought to public reaction. The proper public perception will follow, and even if it did not that would be no justification for public humiliation of lawyers who are not at the time of discipline a threat <u>to</u> the public.

It is, in short, my considered belief that some of our disciplinary agencies and spokesmen have allowed a patronizing concern for that mythical entity "the public perception" divert the disciplinary process from its proper goals in many cases. Those goals are, this Court has repeatedly said, <u>not</u> to punish (though the process itself inescapably does), but to protect the public, the bar and the administration of justice from persons unfit to practice law. We must rigorously do that, and we do a good job of it. No doubt we can do better. But the answer to any defects is emphatically <u>not</u> -- as some of the Director's actions in recent years suggest -- to diminish or indeed eradicate due process at the confidential stage of proceedings, to save time or money or effort in an unseemly rush to get the errant lawyer's name to the news media.

I do not -- though I will of course be accused of it -- suggest "cover up" or "white wash," to use the current clichés. I believe everything we do to lawyers should be available to the public -- the charges, the response, the disposition -- everything except the lawyer's identity, in those cases where identity is irrelevant to the goals of discipline. There is, however, I believe, a grave over emphasis upon making displinary charges, often even relatively non-serious charges, public, as rapidly and with as little "due process" as possible.

2. General Considerations

I trust it will be understood that when in my remarks I criticize the Director, sometimes perhaps with some asperity, I do not intend a personal attach on Mr. Wernz or any member of his staff, or to imply that the practices or attitudes I criticize are always the same. Often my dealings with the Director's office have been amicable, often the Director's position reasonable, often the Director's attitude fair and even tolerant. I have great respect for Mr. Wernz and his staff in general. It is also apparent to me that some of my remarks will offend; I wish it were otherwise, and particularly I hope my criticisms will not result in damage to my present and future clients. Even knowing this possibility, I have nevertheless decided to proceed because these matters seem of such importance to me, and because they lie at the heart of what I do every day, just as they do for the Director. I would not expend this effort upon something of no importance to me.

Though it has never been for me the most attractice feature of the lawyer's calling, we must in an adversary system be occasionally adversarial. I assure the Court, the Board and the Director of my respect, and my hope it is to a degree at least mutual.

It has occurred to me that about half of the time the law is so exhilerating and challenging and rewarding that I cannot imagine doing anything else; the other half of the time it seems so difficult and even effectively impossible with equilibrium to spend one's life solving other people's problems and sharing their grief, that I cannot imagine being insensitive enough to practice law. This incongruous attitude toward one's profession is not one I recommend that anyone else adopt. There are those occasions, however, when a modicum of compassion is displayed by the Director, or the Board, or a referee, or the Court, toward a troubled colleague that is so gratifying that the better half of my outlook so persuasively predominates that the other, sour half seems the merest self-indulgence and even cowardice. So one goes on, inadequate, vulnerable, hopeful.

I regret that a significant number of the lawyers who consult me report that they believe they have been treated in an unduly severe and often demeaning way. I hear a repeated refrain from clients and potential clients to the effect they have been treated inquisitorilly, many saying in virtually the same words that they were made to feel "like criminals." They also report

fequently being "threatened" with Rules 25 and 26 (to which I shall return). Some respondents' misconduct is no doubt deserving of such treatment, and worse, but much is not. There is a tendency, I believe, for the Director and district committees to be very preemptory in demanding "cooperation" on very short notice, sometimes in non-urgent cases that have lain dormant for long periods. This naturally creates a perception of unfairness. Though this perception is no doubt often unfounded, sometimes it is not.

I was also disturbed at a recent seminar to hear both a member of the Director's office and of the Hennepin County Committee caution investigators to be circumspect in writing their reports to avoid material that could be used to a respondent's advantage later in the proceedings. While no fabrication was suggested, the message was clear that evidence or comments either A) favorable to the respondent or B) damaging to the complaint should be avoided or minimized. This does not seem to me, (from my admittedly biased perspective), the attitude that should inform such proceedings, but a scrupulous neutrality and disinterestedness.

Most respondents I see are aware of their duty to cooperate, and willing to do so, but are frightened (often to a point where I have concern for their physical and mental health) or unduly angered, or both. I believe this could be alleviated.

As I have intimated, I believe this Court should strongly encourage private dispositions where no significant risk to the public is present; the charges and dispositions can and should be published, as they are now, without the unnecessary humiliation of identifying the respondent, which also injures his or her family, firm, and clients. I also suggest reported decisions should use initials, so that an errant lawyer's descendants who may enter the law do not have to live with the ignominy of the case in the errant ancestor's name where initials would serve as well. This is done routinely in juvenile cases, for example, with no loss of precedential value. The names in public cases would remain available to the press and in the files, of course. But I have so often experienced the despondency of respondent clients (who are not always scoundrels) at the thought their parents, spouses, children, grandchildren, great grandchildren, and so on, ad infinitum, will bear the stigma of their misdeeds. The law is unique in this; no other profession's discipline is immortalized in the Reporters, literally forever, or so long as we survive. Even a felon, even a murderer or rapist, who does not appeal does not suffer this perpetual ignominy. All too frequently I hear clients contemplating drastic measures from resignation to self-distinction, not because of the immediate disciplinary measure but because they are to become perpetually shameful precedents. Private discipline is enough.

Two final related reflections: 1) I hope the Court will suggest as sharp as possible a distinction between offenses malum prohibitum (e.g. improper bookkeeping and records, commingling, minor neglect or lack of diligence, non-felonious conduct unrelated to fitness to practice such as non-aggravated failure to file or pay taxes, overzealous but non-fraudulent and non-criminal advocacy, etc.), and malum in se (theft, perjury, fraud, etc.), and create a rebuttable presumption the former are to be treated privately at least for first offenders; 2) I hope the court will encourage and assist lawyers with physical or mental disabilities, including chemical dependency and depression, to seek help by recognizing these more generously and compassionately as defenses or mitigation, and instructing the Director to stipulate to treatment on private probation for first offenders except in the most extreme cases, understanding protection of clients is always paramount.

I turn now to the rules themselves. In some but not all cases my suggestions are in response to changes proposed by the Director.

3. Suggestions as to Specific Rules

I shall address the Rules I believe require change in numerical order, which is by no means necessarily in order of importance. I place suggested changes in quotation marks, with occasional comment as seems appropriate. I recognize that, although I respond to the petition, my remarks range father

afield, and naturally I do not expect the Court to act on my word; but I hope at least some of my thoughts will generate discussion in the appropriate quarters.

Title: "Lawyers" should be made possessive, "Lawyers's" in the title and throughout the Rules. (A pedantry to be blamed on my background in English Literature.)

Rule 2. Add before last sentence: "It is also of importance that lawyers whose errosr are non-intentional, non-serious, or related to causes beyond their control, not be stigmatized as unethical, with unnecessary public damage to their reputations, families, firms and clients, whenever the public and administration of justice can be protected by non-public measures carrying no adjudication of unprofessional conduct."

Rule 3. Add here or to Rule 6(c): "(c) The investigator's report shall be designed to contain impartially all relevant information, and shall be made available to the Respondent for Respondent's comments, if Respondent wishes to submit such comments, before it is submitted to or acted upon by the Director."

Rule 4(b). Add: "A reasonable per diem allotment established by the Executive Committee with approval of the Court shall be provided so that the members are not inconvenienced or distracted in their duties by consideration of loss of income in any manner."

Rule 5(a). Add: "The Director may request adjustments in the salaries of the Director and employees when and in such amounts as the Director may deem appropriate."

Rule 6(c). See Rule 3, supra.

Rule 7(b). See Rule 3, supra.

Rule 7(c). Add: "Reasonable extensions of time shall be allowed on Respondent's request for good cause including but not limited to health, workload, duties to clients or other matters making full and fair investigation within 45 days not practicable."

Rule 7(d). Add: "The Respondent may remove a matter from the District Committee upon request." Comment: This is especially important in Hennepin County where the astonishing size of the Committee exposes allegations against a lawyer to a very large numer of other lawyers and may thus place the Respondent at a disadvantage, real or imagined, in dealing with other lawyers who learn of the complaints. Hennepin County is unique in this, and in holding hearings. The Committee hearing is an ordeal not visited upon lawyers elsewhere, and thus raises an Equal Protection concern.

Rule 8(a). Add: "The Respondent shall be immediately informed of any investigation and allowed to respond before any person other than a complainant is informed or contacted, unless the Board chairman or Vice Chairman finds by clear and convincing evidence that to do so would result in obstruction of or other jeopardy to the investigation."

Rule 8(b). Add: "Respondent shall have the same subpoena power. Costs of such proceedings shall be paid by the party issuing the subpoena unless it is demonstrated the other party made the expense necessary, and less expensive means of investigation are inadequate. The Respondent's identity shall not be disclosed by the Director, the person subpoenaed or the Court."

Rule 8(c)(1). Add: "(iv) shall inform the complainant that the Respondent's identity is not to be publicly disclosed." Comment: I suggest that complainants should be informed at the outset of any investigation that the Respondent's identity is confidential unless and until it becomes public under other rules, and that the complainant may be required to testify and be cross-examined publicly.

Rule 8(c). Add (or move to follow 8(c)(3) and renumber following sub-sections): "(5) Warning. Where a lawyer's condcut is questionable or shows poor judgment, but is not clearly unprofessional, or is the result of conditions of health or otherwise beyond the lawyer's control, the Director shall issue a warning describing the preferred course of conduct, which shall specifically state that no finding of unprofessional conduct is involved. A warning is not discipline for any later or collateral purpose. The procedure provided for admonitions under section (c) (2) of this Rule shall then apply." Comment: Many lawyers make errors that are unintentional, non-serious, and

malum prohibitum which do not deserve or require the stigma of unprofessionalism or unethical conduct. This provision would allow prompt and efficient disposition of minor matters, acceptably to Respondents, and would protect the bar and the public by correcting the questionable behavior. We are, I submit, blemishing and aborting the careers of far too many Minnesota lawyers who have made only slight errors and this is unfair and even intolerable. There are discernable differences in kind and quality of offenses not presently recognized in the rules.

Rule 8 (c)(3)(i). Add after the word "unprofessional": "or is questionable but not unprofessional."

Rule 8(c)(3)(i). Add at end: "Where the conduct is questionable but not unprofessional the file shall so indicate, and such a disposition shall not be considered discipline in any future or collateral proceedings."

Rule 9(b)(2). Add: "If the admission is tendered on condition of a private disposition, the panel shall decide whether to accept it, or to proceed to a full hearing."

Rule 9(b)(2). In last sentence, after the word "tender," Add: "not conditioned upon a private disposition."

Rule 9(b). Add: "(3) The Director shall in good faith consider and negotiate, though he is not bound to accept, a Respondent's conditional admission for a private disposition." Comment: The Director has ex parte refused to join in stipulated

conditional admissions, in violation of the clear spirit of the Rule, and now seeks its repeal. This is in my judgment extremely unfortunate. The rule is a good and very useful one in many cases, and the Director should be ordered to implement it. There is an alarming tendency in the Director's office to seek unduly swift, adverse publicity (or to take actions having that result) against Respondents, some of whom clearly deserve and should have a due process determination of the issue. I urge as strongly as I can that the Court reject this defiance of and attack the Rule, and in fact amend it as suggested to encourage rather than abolish conditional admissions. These remarks apply to Rule 10(b), below, as well, and to the Petition.

Rule 9(e). Add: "(4) The Director shall provide Respondent with or without request copies of any statements or summaries or notes of statements by witnesses, and any evidence or information tending to exonerate Respondent or to mitigate the offense or to impeach the Director's evidence."

Rule 9(g). Add: "Probable cause as used here and in Rule 9(i) and (j) comprises two elements: (i) probable cause that the alleged conduct was committed, and (ii) probable cause that public discipline is required. Both must be found before a petition may be filed. If there is probable cause as to the conduct only, the Director may be instructed to dismiss, issue a warning, or issue a private admonition."

Comment: Many cases involve clearly proved conduct, but which does not require public discipline. This distinction should be made clear to referees under this Rule and to Panels under Rule 9(j). This is, I believe, a crucial part of the Rules, and the Director's staff often seeks to avoid or ignore the distinction. The decision is clearly one for the referee or panel, and is of the utmost importance to many Respondents. I fully recognize that while some respondents do not deserve public humiliation, they have committed unprofessional or unwise conduct, and therefore the Director should retain the power to issue warnings and admonitions in such cases. I believe this change would greatly improve the system, increase fairness, and even result in net efficiencies since it would provide additional options and thus encourage more negotiated dispositions as well. The Director has apparently decided, quite unjustifiably in my judgment but no doubt in good faith, that he and his staff will in marginal cases (at least from my point of view) not negotiate private dispositions, or in any cases negotiate conditionally. I urge the Court to reverse this unfortunate policy explicitly.

Rule 9(i). See Rule 9(g), supra.

Rule 9(j). See Rule 9(g), supra, and Add:

"(3) Probable cause comprises two elements: (i) that the conduct was committed and (ii) that public discipline is required. Both must be found before a petition may be filed. If there is probable cause as to the conduct only, the Director may be instructed to dismiss, issue a warning, or issue a private admonition."

Rule 9(j)(2), last sentence: Remove "not," so the panel is required, not forbidden to make a recommendation. Add: "The recommendation is not binding on the referee, but may be considered." In the alternative, make the recommendation permissible. This could aid all parties in many cases in reaching negotiated dispositions.

Rule 10(b). See Rule 9(b), supra.

Rule 10(c). Add, after the words "Chairman of the Board" the following: "after allowing Respondnet to be heard orally or in writing."

Rule 10(d). Repeal this provision.

Comment: The provision for by-passing panel hearings is deplorable, unmanagably vague, and should be repealed; it denies due process and equal protection, delegates the Board's functions and is potentially subject to great abuse. The Director's staff is already using the threat of a by-pass as a bargaining weapon. In one recent case in my own experience despite such a motion (later withdrawn) the panel voted 2-1 for probable cause, one number stating no public discipline was warranted, another that suspension was. At the very least this Rule allows intolerably divergent results dependent entirely on 1) the Director's decision to file the motion and 2) the inclinations or knowledge of the chair who happens to receive it. This abominable rule emasculates due process in numerous cases. It is simply intolerable that this power should be given the Director and a

panel chair, who despite all good faith cannot assure uniform or fair results. It cheapens the entire process and egregiously undermines the respect the bar should have for these important proceedings. It is commonly referred to, not without justification, as a "star chamber" provision. And it is the most obvious and symptomatic of the Director's apparent desire for the public humliation and disgrace of lawyers. All of the enumerated forms of misconduct, with the possible exception of intentional misappropriation, have in the past and might well result in either private dispositions or non-suspensions. Such phrases as "apparently clear and convincing documentary evidence," offense "of a type," "flagrant non-cooperation," "fraud and the like," are hopelessly vague.

The Director is attempting to use the provision for tax violations, for example, despite the fact there are numerous decisions in which lawyers were quite rightly not suspended or disbarred. (I am preparing a comprehensive memorandum explicating all these decisions, and I hope to be able to provide it to the Court.) The tax cases are an example of the Director's determination to short-cut the path to public humiliation. This is destroying professional lives, even families, even potentially but quite literally lives. I can say without exaggeration that I have seen, and believe I am qualified to evaluate, serious warning signs of imminent self-destruction. There is an element of apparently gratuitous cruelty in this which ill becomes our

notions of due process. And it takes no account of the ill or chemcially dependent lawyer. Assuming, as I generally do, that the Director is acting in good faith on what he believes this Court, or earlier Courts, have indicated, I hope the Court will suggest a greater flexibility.

This Court would never tolerate a criminal statute as infamously vague as this, and these are quasi-criminal proceedings. The issue here is not conviction, of course, but in a real sense the consequences of a public petition are to some Respondents as bad as or worse than criminal convictions would be. I wish not simply to request repeal of this section, and I have no authority to demand it, but I implore the Court to remove the malignancy. I do so in the uncomfortable knowledge these remarks may well offend the Rule's sponsors and supporters, and I regret that. But it is not asking much -- just restoration of a bit of due process that got misplaced for awhile, a profoundly important piece to the persons affected, and to the appearance of fairness. When a lawyer concludes his own profession is not treating him fairly, his faith in a great deal, perhaps in everything, is in danger of collapse. Naturally criminal convictions and serious misconduct deserving immediate suspension would remain unaffected, and no more is needed or justified.

My feelings about this rule are obviously strong, and in fact I was preparing a challenge to it before this hearing was known to me. I hope I am not alone in my concern.

Rule 13(b). Do not repeal, as the Director wishes, but add: "The Director shall negotiate in good faith toward possible stipulation when Respondent makes a conditional admission. The Court may accept or reject the conditional admission, request briefs, suggest alternative dispositions to the parties, or refer the matter to a referee, in which case the referee shall consider and accept or reject the conditional admission before proceeding with the hearing." Comment: Contrary to the Petitioner's position, this is a good and valuable Rule, presently ineffective only because of the Director's hostility to it and decision not to cooperate in implementing it. Properly employed, it could and should facilitate prompt and fair disposition of numerous cases which now require hearings because of the Director's insistence despite the Rule on unconditional admissions. (Its usefulness was vividly demonstrated recently in In re Perl, where the Respondent's conditional admission was initially accepted by the Court; the Director successfully petitioned for rehearing; after very lengthy expensive, and exhausting referee proceedings, the result was virtually identical to that initially offered and accepted.)

The Petition urging repeal of repeal displays an alarming misconception of the nature and purpose of disciplinary proceedings, and presents a seriously misguided argument. Emphasizing the duty to cooperate under Rule 25 (a superfluous rule under In re Cartwright, 282 N.W.2d 548 (Minn. 1979) of

doubtful constitutionality in many situations), the argument ignores these crucial Constitutional desiderata: Disciplinary proceedings are accusative, quasi-criminal, not civil, In re Ruffalo, 390 N.W.2d 544 (1968), the Respondent is presumed innocent, the burden in on the Director to prove the charges by clear and convincing evidence. This is where debate must begin, not with the Constitutionally subservient duty to cooperate. The disregard for Constitution and fundamental fairness is betrayed in the statement that "there are, for many good reasons, more constitutional restrictions upon the 'search for truth' in criminal proceedings than there are in disciplinary proceedings." (Statement, p.5) What good reasons? Is loss of a lawyer's license and livelihood less significant than, say, a speeding ticket or disorderly conduct charge?

Since "conditional" admissions are very common and strongly encouraged in all sorts of civil and criminal proceedings, and indeed the ability so to negotiate is an indispensible device of judicial efficiency, it is absurd to suggest there is something disreputable about them in this context. Virtually all negotiations and settlements, civil and criminal, involve conditional admission, or even questionable denials of what is known true. It is ridiculous to claim that a denial in a Rule 25 response followed by a conditional admission involves dishonesty or creates the appearance the "Rule 25 response was false." The Respondent has the right to put the Director to his burden of

proof, (and often a privilege against self-incrimination permitting no answer at all, under Spevack v. Klein, 385 U.S. 511 (1967)); frequently some of the allegations are admitted and not others, or facts are admitted but violations of rules denied, all in perfectly good faith. Moreover, the petition is drafted ex parte by the Director, with negotiating for leverage in mind, and the Director then demands unconditional admissions of what is often at best half-truth; the petition filed before the Answer (a practice that should be forbidden, as discussed elsewhere.) Concern for "inconsistent statements" is also entirely spurious (Ibid), since a Respondent would be subject to damaging cross-examination if he did so; if his tactics are so ppor he deserves to be impeached. And, importantly, there are often facts or violations which are in doubt, which can be denied in good faith, but which Respondent elects to admit conditionally to save all concerned great time and expense. This should be encouraged.

But even more preposterous is the concern that the Court or referees are "tainted" by conditional admissions. (Ibid, p.6) This is also too ingenuous, since it would (if true) adversely affect not the Director but Respondent, whose choice it should be, and the Director shows no such tenderness to Respondents elsewhere. Moreover, it demeans Courts and referees, who frequently are called upon and quite capable of disregarding inadmissible matter in all kinds of proceedings. If a referee

occasionally genuinely feels he or she cannot be impartial, of course, it would be a relatively easy matter to transfer the case to another referee, as happens in nay litigation where a judge is recused.

It is simply not accurate to say that the rule does not facilitate settlements and stipulations. I know from personal experience of many cases over the years when my clients and I settled but would not have done so if the proposed disposition had not been a condition. In other cases we have decided not to stipulate because of the Director's intractable insistence upon unconditional admission. In others, we agreed to unconditional stipulations only with the greatest reluctance and under explicit or implied threat by the Director of an effort to achieve more severe sanctions if we did not settle.

I believe this is the single Rule which, properly honored by the Director, could most enhance disciplinary effectiveness, efficiency and fairness, and I have greatly regretted the Director's decision to refuse to enter into conditional stipulations; there would be many more stipulations a year if he would do so, I believe.

Another decisive fact is that neither the Court nor the referee is required to accept them, so there is nothing to be lost by the effort. The attempt to repeal this Rule is one of the most conspicuous examples (with the effort to by-pass panels under Rule 10(d) supra, the Director's issuance of press

releases, and intimidating use of Rule 25) of an unfair and unnecessary pattern of practices designed to achieve swift public mortification of lawyers who have had no chance to defend themselves before a neutral and disinterested tribunal. This is all the more deplorable in view of what I see as a badly displaced sense of perspective as to which offenses require public as opposed to private discipline.

The only defect in Rule 13(b), as I see it, is the Director's refusal to help make it work. I do not know why he takes this position, since the reasons given are altogether unpersuasive. I am aware of no case where a Respondent gave "inconsistent" statements, and the Director cites none, but that would be a Respondent's own undoing in any event, and no reason at all to destroy a good rule.

Unfortunately, in my experience, all too often things are seen only in black and white, either-or, all or nothing, terms, both as to whether given conduct is improper, and as to the disposition. In fact, in discipline matters as much as (or more than) in other areas of the law we find situations with great uncertainty, graynesses, requiring flexibility, imagination and innovativeness, as this Court has often recognized. Instead we find too often intimations of dire consequences to Respondents who do not immediately cry mea culpa and throw themselves on the mercy of the Director and the Court -- no matter what such Respondents believe is true and fair. Indeed, I carefully

examined the 17 stipulations in 1987, (referred to at p.6 of the "Statement"), and two striking things appear: 1) the Respondents seem often to have been unrepresented, though I cannot be certain, and 2) the dispositions often appear far too harsh in light of earlier cases. Some clients of mine, to my regret, have agreed to such stipulations out of sheer fear, embarrassment, and financial contraints. These "stipulations" unfortunately become precedents which the Director then uses to continue raising the stakes of disciplinary sanctions.

As strongly as I am able, I urge the Court not to repeal this Rule, but to strengthen it, and encourage its use.

Rule 13, and Rule 12(a). Add: "The Respondent shall be allowed to file his Answer simultaneously with the Petition, unless he cannot be found or declines to do so, by forwarding the required number of copies to the Director within 20 days, whereupon the Director shall file the Petition and Answer together, and make them equally available to the press and the public." Comment: Simple fairness dictates this, and there is no corresponding contrary interest. The Petition in the Director's harshest accusatory language, deliberately disseminated to the press, and therefore receives attention, but the Answer rarely, if ever, does. There is no reason I can think of why the Respondent, if he complies with time and other requirements, should not have his reply to the charges released and filed with them to balance the story. Rule 12(a) on filing the petition should also, or in the alternative, contain this provision.

Rule 14(e). Change "five" to "twenty" days and Add: "Only those portions of the transcript necessary to the determination of the issues need be ordered. The other party may order additional portions." Comment: The very short five day period is often too brief to allow evaluation of the referee's report, especially if counsel or the respondent is out of town. These proposed changes would allow more careful consideration, possible negotiations in appropriate cases, and often a desirable limitation of the record. I believe the change proposed by the Petition to Amend is superfluous, and the Court must consider the financial difficulties of many Respondents who are unable immediately to order and pay for transcripts.

Rule 14(g). Add: "The Court may, upon motion of the Respondent, review the referee's report, and accept it without further proceedings, or after requesting information submissions." Comment; In many cases the Respondent, or both Respondent and Director, are willing to accept most if not all of the referee's report. Although Respondents should always have the right to be heard by the Court, in appropriate caes they should be allowed to space themselves, as well as the Director and the Court, the burden of further proceedings. Especially if there is no precedential value. The Court, I believe, has the inherent power to grant such motions by the Respondent, but it would be preferable to have it explicit in the Rule.

Rule 15(a). Add: "(10) Instruct the Director to issue a private warning or admonition or probation."

Add: "(11) Order the Director to pay costs and disbursements as under subsections (3) and (8) of this Rule."

Add: "(12) Decide that the opinion should not be published."

Add: "(13) The caption of published opinions shall use the Respondent's initials. The Court shall determine whether the full name appears in the body of the opinion, but except in cases where the Respondent's name is otherwise confidential, the name shall be available to the public upon request."

Add: "(14) The Court may order a suspended lawyer automatically reinstated with waiver of Rule 18.

Comment: My concerns and reasons for the suggested subsections (12) and (13) are mentioned earlier, i.e. to spare the Respondent's descendants embarrassment.

Rule 16(a). Change "may result in risk of injury" to "appears by clear and convincing evidence to create a risk of substantial injury to the public, which no less severe measures may prevent."

Rule 18. Add: "(f) The Court may order that any or all of the procedures in this Rule are waived, or that the Respondent be automatically reinstated." See also proposed Rule 15 (a)(14) above.

Rule 19(a). Add: "The Respondent may, however, offer any evidence in explanation or mitigation of the offense." Comment: This simply states current law, but I believe it should be in the rule to guide pro se Respondents or inexperienced counsel.

Rule 19(b)(1). Repeal the last clause, "except . . . violation."

Rule 19 (b)(2). Add: "The respondent may offer evidence in explanation or mitigation, or that the prior proceedings lacked due process."

Rule 19(b)(3). Repeal subsections (b)(3)(i) and (b)(3)(iv) and renumber the remaining subsections.

These suggestions deserve further comment, because they address important questions of fairness, but despite my best efforts I have not had time to explicate them further. The same is true of the following proposals. I respectfully ask the Court (and the Board), however, simply to consider whether they do in fact promote fairness, with no corresponding loss, and should therefore be adopted.

Rule 20(a)(4). Add: "All materials tending to exonerate the Respondent or mitigate the offense must, however, be disclosed even if technically "work product" or not in written form, such as but not limited to, records or knowledge of statements by or about the complainant or the Director's witnesses."

Rule 20(d)(1). Change "three years" to "immediately" and add: "subject to subsection (2)."

Rule 20. Add: "(e) The Director shall not issue press releases or other information either of his own volition or in response to "standing requests," but only upon specific request as to each particular case. As to matters publicly filed, the

Director shall instruct any enquiring person to consult the records of the Court. Whenever a Petition is disclosed the Answer shall also be provided, unless no Answer has been timely filed.

Rule 21. Add: "(c) This immunity shall not extend to willful or malicious misconduct or false statements."

Rule 21. Add: "(d) The same immunity shall extend to the Respondent and his counsel if any."

Rule 25(a). Add: "Requests shall be carefully limited to the specific subject of the complaint, and not merely exploratory."

Rule 25(b). Add: "The Respondent may not be disciplined for proper assertion of a privilege including but not limited to the privilege against self-incrimination, the attorney-client privilege, the doctor-patient privilege, the clergyman's privilege, or the marital privilege, nor for good faith assertion to the right of privacy. The Director shall inform any pro se Respondent of his or her rights and privileges."

Rule 26. Add: "(h) The provisions of this Rule may be waived by the Court, the Referee or upon stipulation, provided the rights and interests of all clients are protected."

Rule 26. Add: "(i) A lawyer suspended for six months or less need not remove his name from a lawfirm's letterhead, stationary, office door or wall, telephone or other listings, provided there shall be no false and misleading affirmative representation the lawyer is actively practicing." Comment:

Although the Rule does not now require it, the Director takes the position that all traces of any lawyer's name must be physically removed from where ever it appears. This is, I believe, an altogether unnecessary and often very expensive measure. A lawyer who is on vacation or ill for a relatively brief period (up at least to six months) is not, so far as I am aware, required so to disappear, any actual misrepresentation can be punished, and unauthorized practice rules will prevent actual practice by the suspended lawyer. Yet the Director's policy is to threaten charges of misconduct if these drastic measures are not immediately taken.

Rule 28. I do not understand the change being proposed here, and I therefore cannot address it, but I am concerned that a Rule is sought which could drastically invade a Respondent's privacy or doctor-patient confidentiality. Many lawyers have illnesses which, though not offered or treated as complete defenses, are relevant mitigation or explanation as many cases recognize. I believe any change in Rules bearing on this is unnecessary, since it is essentially a question of admissability and weight of evidence. But because of the highly sensitive nature of the subject, I suggest the Court instruct the Board or Director to offer a specific proposal so that it can be understood and evaluated. If, however, the proposal is merely to deal with Respondents who are or claim or appear to be incompetent during the panel proceeding itself, I agree with the Board's and Director's position, but I think the Rules and cases already cover it.

Rule 29. Adopt new Rule, or add to Rule 20.: "The Director shall keep records of all private dispositions other than dismissals, and upon request of a Respondent, a panel, or the Court, copies shall be provided, (with names of Respondents removed), for purposes of negotiating, arguing or arriving at proper and uniform dispositions in cases involving similar or related forms of misconduct or other similar circumstances. These dispositions shall be available at panel hearings and relevant to the decision whether public discipline is warranted."

Comment: It is essential that panels be fully informed on private dispositions of similar cases to decide the issue of probable cause for public discipline. At present these are apparently not availabe, and I very strongly believe they should be. The Director may, of course, require some time to do this, and should be allowed a reasonable period to comply. But it is certainly in everyone's interest to assure as much comparative analysis of similar cases as possible and this can be done without compromising confidentiality.

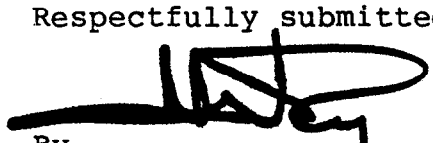
Rule 30. Adopt new Rule:

"Upon request of a Respondent, with waiver of any right to a speedier disposition, after receiving a complaint the disciplinary proceeding shall be held in abeyance until any related pending civil or criminal proceedings or investigations are completed, except in cases falling under Rule 16 or 28."

CONCLUSION

In closing I want to thank the Court, the Board and the Director for any attention that may be given the concerns I have expressed.

Respectfully submitted,



By_____

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Dated: April 29, 1988

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April 27, 1988

Clerk of Appellate Courts
230 State Capitol Building
St. Paul, Minnesota 55155

Re: Petition to Amend the Minnesota Rules on Lawyers Professional Responsibility

Dear Clerk:

Enclosed please find original and nine copies of a Memorandum regarding the above captioned Petition.

Sincerely,

ZIMMERMAN & BIX, LTD.

Manly A. Zimmerman

MAZ/cs

Enclosures

4/29/88

STATE OF MINNESOTA
SUPREME COURT OF MINNESOTA
C1-84-2140

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In Re Petition to Amend the Minnesota Rules on Lawyers Professional Responsibility.

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MEMORANDUM

There is a hearing scheduled on May 12, 1988 regarding the the above captioned Petition.

This Memorandum involves my thoughts regarding Rule 8(b) which is entitled "Complaints by Criminal Defendants."

I have a part-time position with the Hennepin County Public Defender's office. My job is to run the Conflicts Panel for the Hennepin County Public Defender. I am also a private practitioner. Therefore, I have had many experiences involving conflicts of interest since 1976 when I first started running the panel.

I am pleased that the petition seeks to change the Rules regarding complaints by criminal defendants against their attorneys while the criminal charges are still pending. However, the amendment does not go far enough. The amendment should include not only the complaints of a defendant but also any complaints made on behalf of a defendant in a criminal case. I also feel that there should be a provision in the Rules with regard to civil litigation. Personally, I do not see any difference if the litigation is civil in nature or criminal in nature.

There is one other matter upon which I would like to comment. Recently, the Director of the Office of Lawyers Professional Responsibility ruled that the conflict of interest rules do not apply to attorneys in a public defender's office. In his opinion, the Director referred to Humphrey v. McLaren, 402 N.W. 2d 535, at

page 543. According to the Director, a public defender's office is not a law firm as defined in Rule 1.10 in the Rules of Professional Conduct.

Assuming the Director is correct, then the Rules should be changed so that a public defender's office is included in the definition of a law firm.

A rose by any other name still smells like a rose. A conflict of interest is a conflict of interest whether or not the client is represented by a public law firm or a private law firm.

Common sense tells you whether you should represent a client or not. It makes no difference if the client is going to pay you or whether the Court has appointed an attorney to represent the client. The same attorney/client relationship exists and there is no way that a conflict of interest may be waived just because the client does not have to pay an attorney's fee.

Manly A. Zimmerman
Suite 400, 514 Nicollet Mall
Minneapolis, Minnesota 55402
(612) 333-8225
I. D. No. 120091

April 27, 1988.

PETITION OF THE LAWYERS PROFESSIONAL RESPONSIBILITY TO AMEND RULES

Supreme Court No: C1-84-2140

Hearing Date: 5-12-88
Supreme Court Chambers

NAME		DATE WRITTEN SUMMARY FILED	ORAL PRESENTATION YES	ORAL PRESENTATION NO	ORDER OF ARGUMENT	ALLOTTED TIME
William J. Wernz	Director of the Office of Lawyers Professional Resp.	3-10-88	X			
Bill Kennedy	Hennepin Co. Pub. Defender	4-29-88	X			
Robert Biglow	Attorney	4-25-88		X		
David H. Knutson	Assistant Hennpin County Public Defender	4-28-88	X			
Jack S. Nordby	Attorney	4-29-88				
Theodore J. Collins	Attorney	4-29-88				
Manly A. Zimmerman	Attorney	4-29-88		X		