ANNUAL REPORT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

ANNUAL REPORT OF THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY

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OFFICE OF
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June, 1991

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June 17, 1991

Fred K. Grittner
Clerk of Appellate Courts
25 Constitution Avenue
St. Paul, MN 55155

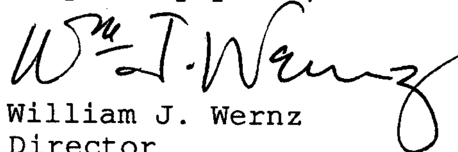
Re: Annual Report

Dear Mr. Grittner:

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

The justices received copies of the report prior to the Board's approval. The Board approved the report, as submitted, on June 14, 1991.

Very truly yours,



William J. Wernz
Director

jd
Enclosure
cc: John E. Simonett (w/enclosure)

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APPENDIX

A. 1-2 - Article on Trusteeships - Picking Up The Pieces.

A. 3 - Article Summarizing Changes in Rules on Lawyers Professional Responsibility.

A. 4 - April 1991 District Ethics Committee Report on Aging Statistics.

A. 5-6 - Article Discussing Opinion on Attorney Liens.

A. 7 - Program Schedule for Professional Responsibility Seminar.

A. 8 - FYE 4/30/91 Budget Expenditure Summary.

A. 9 - Current Office Personnel and Organization Chart.

A. 10 - Article re Trust Account Overdraft Program.

A. 11-19 - ABA Report: Recommended Standards.

I. INTRODUCTION.

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

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

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

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

The Board's Report and the Director's Report are hereby jointly made. This Report covers the period June 1, 1990, through May 31, 1991.

Justice Glenn Kelley's departure from the Supreme Court and from his post as Court liaison to the Lawyers Board must be noted before the events and developments highlighting this year's activities. For seven years Justice Kelley had helped anchor the Court's and Board's challenging work of governing lawyers professional responsibility. Justice Kelley would be more greatly missed were it not for his continuing to act as the Court's referee in several discipline matters; and for his being succeeded by Justice John E. Simonett.

Highlighting this year's report is the alarming increase in the number of cases involving misappropriation of significant sums of client funds.

- **Misappropriation Cases and Other Serious Misconduct.** The last year has witnessed far more large misappropriations ($20,000 or more each) than any comparable period in Minnesota history. Fourteen such

cases have been publicly filed by the Director's Office or decided by the Supreme Court in the last year. Fortunately, no single case involved the notorious and large-scale thefts by attorneys such as Flanagan, Sampson, Batdorf, Benson, Danna, O'Hagan and Bartsh. Disbarment has been the norm for all the 1990-91 significant misappropriation cases which have reached final decision: Plowman, Ladd, Rothstein, Walker, Simonet, Larsen and Andrew. In most cases temporary suspensions during discipline proceedings were sought and, in all but one case, granted by the Court.

- **Overdraft Notice Program.** The most recent program proposed by the Board and bar, and adopted by the Court, for dealing with misappropriation is the automatic notification of trust account overdrafts. This program was implemented in August 1990. The primary initial impact of the program has been educational: attorneys with poor trust account practices, but no dishonest intent, have received instruction in proper trust account management, to avoid future overdrafts. Three matters have been uncovered through the program which have led to petitions for disciplinary action.
- **Trusteeships.** In recent months, the Director's Office has been called upon with greater frequency than ever before to serve as trustee for a law office which has been abandoned by a disabled or dishonest lawyer. An article describing the procedures and burdens from this work is attached at A. 1.

- **Rules Amendments.** The procedural Rules on Lawyers Professional Responsibility were extensively amended for the first time in several years. The amendments were generally not controversial, and were aimed at greater efficiency and codification of developing practices. An article summarizing the changes is attached at A. 3. The Rules of Professional Conduct were not amended this year, but the MSBA will, at its June 1991 convention, consider proposals for (1) adding a rule against illegal discrimination serious enough to reflect adversely on the lawyer's fitness; and (2) clarifying the rule requiring attorneys to report misconduct. Preliminary discussion is also expected on whether proposals should be developed for amending the rules on advertising and solicitation.
- **District Committees.** Last year's great increase in the number of complaints resulted in new burdens on the volunteer district ethics committees. The initial result was that investigations could not be handled as promptly as desired, particularly in Hennepin County. In April 1990 the average volunteer investigation took 2.2 months statewide and 2.7 months in the Fourth District. Attached at A. 4 is the April 1991 report showing improvement to a statewide average of 1.7 months and a Hennepin average of 2 months.
- **Lawyers Board and Office Opinions.** In June 1990 the Lawyers Board issued its formal opinion on the perennially controversial subject of attorney liens on homesteads. An article discussing this opinion is

attached at A. 5. The opinion seems to have succeeded to a remarkable extent in quelling the controversy. Informal telephone advisory opinions continue to be given by the Office of Lawyers Professional Responsibility. In 1990 1,130 such opinions were given to attorneys who requested guidance about their own proposed future courses of conduct. The increase in the demand for the opinion service has been strong and continuing: 1987 (630); 1988 (815); 1989 (948).

- **Budget, Fee Increase and Personnel.** The fee paid by Minnesota lawyers for the professional responsibility system has been increased only once since 1984, by ten dollars. An additional fee increase may be necessary in 1992, although the increase might be delayed if the state budget crisis results in a freezing of Office salaries, which comprise most of the budget. The Office staff is highly experienced, and there is little turnover; it is hoped that salary constraints will not result in employee departures.
- **Judgments and Collections.** The Office has recently increased its efforts to collect judgments owed as a result of disciplinary proceedings. Due to these efforts, and to the large number of Supreme Court disciplines, the amount collected in 1990 increased from about $13,000 in 1989 to about $27,000.
- **Professional Responsibility Seminar.** The eighth annual Lawyers Professional Responsibility Seminar was held on October 19, 1990. A copy of the program schedule is attached at A. 7. Among the attendees were:

6 Supreme Court justices and referees,
16 Minnesota and North Dakota Lawyers Board members,
8 district committee chairs,
73 district committee members,
6 respondents' counsel,
12 probation supervisors, and
6 law professors, including Maynard Pirsig.

Highlights of the conference included lively discussion about whether more attorney discipline records should be publicly available; and whether there should be a disciplinary rule against illegal discrimination. The acting chair of the ABA Commission on Evaluation of Disciplinary Enforcement brought the seminar up to date on the issues confronting the Commission. In recent years the emphasis at the annual seminar has shifted from the district committees to more general professional responsibility matters. However, an expanded district committee workshop was exceptionally well received and will be repeated in future years.

II. CASE LOAD AND CASES.

A. Statistics.

The statistics reported in June 1990 showed a large increase in the number of complaints, the average age of district committee investigations and in the number of Supreme Court dispositions. From 1989 to 1990 the number of complaints increased 15 percent and the number of Supreme Court dispositions increased 45 percent. See Tables I and II (pp. 7, 8). Through the first five months of 1991 the number of complaints overall

has increased only slightly and the projected number of 1991 Supreme Court dispositions should be lower than in 1990.

The promptness with which the increased case load has been handled at all levels of the discipline system has been remarkable. Supreme Court dispositions throughout the period 1988-90 are far faster than in the period 1985-7. See Table IV (p. 9). The contrast with previous years is even stronger--for example, in 1984 Supreme Court probations, suspensions and disbarments averaged 30, 27 and 35 months start to finish, between two and three times the current pace. In a system oriented toward protection of the public from future misconduct, such statistics are especially important.

The overall case aging, public and private (Table II) shows very few files ever becoming more than one year old. The oldest files on hand are again those in which disciplinary consideration has been deferred until completion of litigation in other forums.

The district committees have increased their volunteer efforts to deal with the larger number of complaints. The temporary problems reported last year have been surmounted, with the average file age equaling 1.7 months, instead of the 2.2 months reported last year. Hennepin County deserves special recognition for surmounting the problems posed last year, and reducing the average file age in the fourth district to two months. Excellence has come to be expected of Ramsey County, which on April 30, 1991, had an average file age of only 1.3 months. Promptness in investigation would mean little without the high quality that continues to mark the work of the district committees generally. Attached at A. 4 is the most

recent district committee summary and aging analysis report. Thanks and congratulations to the district committees are once again in order.

Table I
Supreme Court Dispositions 1976-1990
Number of Lawyers

	Disbar.	Susp.	Prob.	Censure & Rep.	Dismis.	Other	Total
1976	4	5	0	0	0	1	10
1977	1	2	0	1	0	0	4
1978	6	10	3	4	0	0	23
1979	6	4	2	3	0	0	15
1980	1	3	1	1	0	0	6
1981	3	4	1	1	1	0	10
1982	6	8	0	5	2	2	23
1983	4	4	0	3	2	1	14
1984	3	7	3	9	0	1	23
1985	4	15	13	10	3	1	46
1986	8	17	4	2	0	0	31
1987	5	18	7	4	0	0	34
1988	4	22	8	4	1	0	39
1989	5	19	8	4	2	0	38
1990	8	27	9	10	0	1	55

Table II

	12/82	12/84	12/86	12/88	12/90	5/31/91
Total Open Files	669	686	406	358	462	431
Cases at Least One Year Old	257	242	52	39	56	57
Complaints Received Y.T.D.	1,013	1,069	1,233	1,149	1,384	602
Files Closed Y.T.D.	1,146	1,005	1,244	1,180	1,417	639

Table III

	Percentage of Files Closed					
	1985	1986	1987	1988	1989	1990
1. **Total Dismissals**	**82%**	**82%**	**79%**	**81%**	**79%**	**76%**
a. Summary Dismissals	30%	34%	36%	41%	38%	38%
b. DNW/DEC	36%	39%	34%	32%	35%	32%
c. DNW/DIR	17%	9%	9%	8%	6%	6%
2. **Admonitions**	**7%**	**8%**	**9%**	**9%**	**10%**	**9%**
3. **Private Probation**	**4%**	**1%**	**2%**	**2%**	**1%**	**2%**
4. **Supreme Court Dispositions**	**6%**	**8%**	**9%**	**7%**	**8%**	**11%**
a. S. Court Dismissal	--	--	--	1%	--	--
b. S. Court Reprimand	1%	--	1%	--	--	1%
c. S. Court Probation	1%	--	1%	1%	1%	1%
d. S. Court Suspension	3%	3%	3%	4%	5%	6%
e. S. Court Disbarment	1%	5%	4%	1%	2%	2%

Table IV

Number of Months File Was Open at Disposition

	1985	1986	1987	1988	1989	1990
Discipline Not Warranted/District Ethics Committee	6	4	4	4	4	4
Discipline Not Warranted/Director	13	6	6	6	4	7
Admonition	12	8	8	9	8	8
Private Probation	19	13	8	10	13	10
Sup. Ct. Reprimand	30	24	25	20	16	11
Sup. Ct. Probation	13	42	22	11	13	14
Sup. Ct. Suspension	30	27	25	16	11	12
Sup. Ct. Disbarment	11	13	12	9	9	12

B. Minnesota Supreme Court Disciplinary Cases.

In 1990 there was an exceptionally large number of serious discipline cases, particularly cases involving misappropriation. The number of disciplines imposed by the Court increased approximately 50 percent over the average of recent years. Among these, the most prominent categories were attorneys who misappropriated funds and attorneys who had previously been disciplined by the Court.

Since June 1, 1990, the following attorneys have been disbarred for misappropriation:

Dean Larsen

John Andrew

Samuel Walker

Morry Rothstein

William Ladd

George Plowman

William Simonet

The following attorneys are subject to petitions in the Supreme Court in which significant misappropriation is alleged, and admitted:

James Hunter

Claude Loewenthal

Robert Stroble

Mark Stromwall

David Anderley

To renew the bar's awareness of the consequences of misappropriation and trust account misuse, the Court recently stated:

> We do feel an obligation to advise the bar that this court is getting increasingly alarmed at the numerous cases of trust account violations by lawyers of this state. The number of instances of notorious cases should have by now alerted lawyers to the seriousness of this problem. We thus can no longer treat lightly any abuse of trust accounts. Moreover, these violations are becoming increasingly costly to every lawyer in this state. Therefore, we feel compelled to advise the bar that misuse of trust accounts in the future will (1) almost invariably result in lengthy suspensions at the very least and disbarment at worst, and (2) that retainer fees not immediately placed in a trust account will be looked upon with suspicion.

In re Lochow, No. C8-90-1253, slip op. at 12 (Minn., May 3, 1991).

Before Lochow it had already been the Court's practice to disbar the great majority of attorneys involved in extensive misappropriation. The main exception to this rule has been for

attorneys who prove that their actions were caused by serious chemical dependency or psychological problems. Even within this group, most of the attorneys who took funds while affected by psychological problems were suspended for significant periods of time. Lochow appears to expand the Court's stern discipline to "misuse of trust accounts" generally, a broader subject than intentional misappropriation. While misappropriation was a dominant theme in this year's discipline cases, there are other matters of note.

Several lawyer discipline cases which attracted public attention were related to the discipline of Senator David Durenberger. Last summer the United States Senate denounced Senator Durenberger. Pursuant to stipulation, in January 1991 Senator Durenberger was suspended as a lawyer for an indefinite period of time. One of his lawyers in 1983 and early 1984, Hennepin County Commissioner Randy Johnson, was publicly reprimanded for falsely dating and notarizing documents. Durenberger's lawyer from late 1983 through 1989, Michael Mahoney, is the subject of a pending petition before the Court, which alleges offenses similar to some of those admitted by Durenberger. These relate to improperly dated and notarized documents, improper administration of a blind trust and, particularly, to improper reimbursement from the United States Senate for certain expenses connected with Durenberger's condo.

Although Senator Durenberger himself was not acting as a lawyer in connection with the matters for which he was subject to lawyer discipline, there were several purposes served by the discipline. The minimum standards of the profession have long been applied to lawyers even when they are acting in non-lawyer

capacities, when the misconduct is sufficiently serious. In the cases of Durenberger and his lawyers, the alleged rule violations entail prejudice to the administration of justice, misrepresentations and other dishonesty. Also, when public funds are improperly used by a lawyer, it must be made clear that such conduct falls below the standards of the profession. Finally, there is the regrettable spectacle of several lawyers acting together and successively, in improper ways, that brings the profession into disrepute. To these lawyers' credit, they have generally, upon reflection, recognized the shortcomings in their conduct, and agreed to the Court's discipline.

III. NEW RULES AND RULE AMENDMENTS UNDER CONSIDERATION.

A. Rules on Lawyers Professional Responsibility.

Effective March 1, 1991, the Rules on Lawyers Professional Responsibility were amended on petition of the Lawyers Board. An article describing the amendments, as they were proposed, is attached at A. 3.

The proposed amendments were adopted almost in their entirety. The proposals were not controversial, and only two comments, on matters of detail, were filed with the Court regarding the proposals. In summary, the Rules were amended for several reasons:

1. To codify certain rulings of the Court, as well as certain practices of the Board and Director's Office;
2. To increase the Board's dispositional and review authority over the Director's Office in certain limited classes of cases;
3. To respond to changes and to address miscellaneous problems; and

4. To make the Rules' terminology gender-neutral.

The Board's dispositional and review authority was increased in two narrow situations: (1) when charges of unprofessional conduct are issued against an attorney, after hearing, a Board Panel now has the authority to issue admonitions, as well as their continuing authority to direct filing of public petitions; and, (2) on complainant appeals, Board members may now instruct the Director to issue an admonition if the district committee had recommended discipline and the Director had instead dismissed.

B. Proposed Amendments to the Minnesota Rules of Professional Conduct.

The Minnesota State Bar Association will consider at its June 1991 convention two proposed amendments to the Rules of Professional Conduct.

Proposed Rule 8.4(h) would make illegal discrimination reflecting adversely on a lawyer's fitness also subject to discipline. A proposed amendment to Rule 8.3 would authorize attorneys to reveal, in certain circumstances, information about another attorney's serious misconduct. The Lawyers Board will consider whether to take a position on these proposals, and what position to take, at its June 14, 1991, meeting.

IV. DIRECTOR'S OFFICE.

A. Budget.

1. FY'91 Budget.

Projected actual expenditures for the fiscal year ending June 30, 1991, should be approximately $1,160,000. This would be about $135,000 less than the original budgeted expenditures for

the fiscal year. The principal savings were in two areas, personnel and computer. Maternity leaves and one other leave were the main reasons for lower personnel costs. The savings in the computer program costs are occasioned by a delay in implementation until FY'92. Attached at A. 8 is the FY'91 expenditure summary as of 4/30/91.

2. FY'92 Budget.

The FY'92 budget is extraordinarily complicated, for several reasons. First, the current state fiscal crisis makes it necessary to project alternate salary possibilities, depending on whether there would be any increase for merit or cost of living or both. There is a $50,000 spread between the lowest and highest possibility. It now appears that there may well be a wage freeze; the lowest figure, of $1,268,259, would then be the FY'92 expenditure budget. This figure includes no increase for salaries beginning July 1, 1991. There are no staff additions in the FY'92 budget. The second main variable in FY'92 expected expenditures is whether a new computer program will be fully implemented, at a cost of over $50,000.

Projected income for FY'92 is also exceptionally complicated. The main revenue source is calculated by multiplying the appropriate registration fees by the expected number of attorneys paying these fees. The number of attorneys has increased more slowly than previously projected, resulting in a smaller increase in income than expected. Appropriate adjustments have been made. On the other hand, more income is being received from the late fee for attorney registration, which was increased from $5.00 to $50.00. This resulted in a substantial increase in FY'91 income,

but it is difficult to project from a one year historical base for expected late fee income for FY'92.

3. Fee Increase.

In the June 1988 Annual Report of the Board and the Director, the following was reported:

> Effective 7/1/88 each Minnesota attorney paying the full fee will pay an additional ten dollars, increasing the amount allocated for the Lawyers Board to eighty dollars per attorney. This is the first increase in the fee since 10/1/84. It is expected that revenues will be sufficient--assuming there are no unforeseen changes--so that another three to four year interval can transpire without an additional increase.

This forecast was accurate. Effective 7/1/92 or 7/1/93, a fee increase will be needed. The amount and timing of the requested increase will depend on the allowable salary increases, which in turn will be controlled by the state budget and wage contracts for the biennium beginning 7/1/91.

B. Administration.

1. Computerization - TCIS.

The computerization has not moved ahead as quickly as anticipated for several reasons. While the needs analysis was and will be helpful in identifying our programming needs, it was determined that the overall project plan should be further defined. In June 1990, the needs analysis was completed by the consultant. For the past several months Board member Ron Snell has been working with Supreme Court Information Systems on a project outline which defines our needs and expectations for the consultant ultimately hired to do the programming and design. In Spring 1991 it was determined that the project plan would be

submitted to several consultants for bid. Bids are expected to be taken in May or June 1991.

The funds allocated but not expended for the computer project in the FY91 budget have been transferred to the FY92 budget.

2. Computerization - Macintosh.

We were successful this year in computerizing the legal assistant department. Each legal assistant is currently using a Macintosh computer, bringing the office total to six. The Mac's are a valuable tool in conducting trust account audits, calendaring and departmental monitoring. The six computers are served by one laserwriter printer.

3. Remodeling.

In FY91 remodeling was done to make an additional attorney office. The size of the workroom was reduced by pulling files for storage. The Office obtained 400 square feet of additional storage space to store the files.

4. Word Processing.

A fourth word processing terminal was purchased this year to allow part-time help to work during the day. In the past, it was necessary for part-time help to work evenings due to the availability of equipment.

C. Personnel.

Attached at A. 9 is the current Office organization chart. In FY'91 there were two employee resignations. Legal assistant supervisor Kevin Slator resigned to accept an attorney position with a private firm. Lynda Nelson was promoted to legal

assistant supervisor. Meg Rachleff was hired to fill the vacant legal assistant position. Part-time word processing operator Renee Schoenberg resigned and the position was filled by our long-standing receptionist Jean Capecchi who was interested in working part-time. Jean's vacancy was filled by Kally Lombard.

Patricia Jorgensen was on family leave from July 1990 to March 1991. Upon her return from family leave, Patricia Jorgensen requested to work half-time. As a result, we instituted our first job share arrangement. Karen Phillips was hired to fill the remaining half-time position.

Senior Assistant Director Wendy Legge took a six-month leave of absence from January to July 1991. Candice Hojan will be returning from family leave in mid-July. Barbara Bastian was hired as a Special Assistant Director to work full-time for one year to fill the leave positions.

The FY'91 budget included an additional staff attorney. In September 1990, Karen Risku was hired as our ninth full-time Assistant Director.

Attorney Patrick Burns was promoted to Senior Assistant Director in May 1991. Pat has been on staff since 1988.

There are no personnel additions in the FY'92 budget.

D. Trusteeships.

Attached at A. 1 is a Bench & Bar article entitled "Picking Up the Pieces" which addresses the trusteeship function of the Director's Office.

During the past year, client files of Joel Thompson and Robert Stratton were destroyed. Trusteeship files remaining in our possession include Mark Sampson, Wayne Wentworth, Steven Heikens, Diana Logan and James Skonnord. In 1990 the Office

obtained 400 square feet of storage space to help accommodate the trusteeship files.

Since our last report, the Director has been appointed to four additional trusteeships, William Ladd, James Hunter, William Peters and Roger Nurnberger.

1. William Ladd.

On December 7, 1990, the Court appointed the Director as trustee of the client files of William Ladd. The Director took possession of 246 client files. 151 files were returned and 9 were destroyed at the client's request. The remaining 86 files will be destroyed after approximately three years.

40 attorney hours, 41.5 legal assistant hours and 40 clerical hours were expended. $255.70 was spent for postage to return client files.

2. James Hunter.

On January 10, 1991, the Court appointed the Director as trustee of the client files of James Hunter. The Director took possession of 136 client files. 83 files were returned and 8 were destroyed at the client's request. The remaining 45 files will be destroyed after approximately three years.

25 attorney hours, 39 legal assistant hours and 34 clerical hours were expended. $168.00 was spent for postage to return client files.

3. William Peters.

On February 20, 1991, the Court appointed the Director as trustee of the client files of William Peters. This is the second trusteeship undertaken for Mr. Peters. The Director took possession of 77 client files. 44 files were returned and 5 were destroyed at the client's request. The remaining 28 files will be destroyed after approximately three years.

8.5 attorney hours, 20 legal assistant hours and 48 clerical hours were expended. $116.70 was spent for postage to return client files.

4. Roger Nurnberger.

On March 4, 1991, the Court appointed the Director as trustee of the client files of Roger Nurnberger who was placed on disability status. The Director took possession of 816 files belonging to 309 clients. An independent contractor was hired to inventory and return the files. As of May 14, 1991, 111 clients requested return of their files and 23 files were destroyed. There are an additional 221 files received that, due to their age, the clients will not be contacted. All remaining files will be destroyed after approximately three years.

15 attorney hours, 89 independent contractor hours and 29 office administrator and clerical hours were expended. Postage costs have totaled $451.72.

E. Probation.

During 1990, the probation department continued to strengthen its monitoring of probationers' compliance with terms and conditions of Supreme Court ordered or private stipulated probations. A supervisor's manual was drafted to assist in recruiting and training volunteer supervisors. The department also conducted a survey of probation supervisors regarding their time commitment and training needs. The Office increased the amount of attorney and legal assistant time devoted to this function.

Efforts have been made to establish a panel of volunteer supervisors who may be called upon when probationers are unable to nominate a supervisor. The department also continues to monitor unsupervised probation compliance and has increased its auditing of probationers' books and records.

The Rules on Lawyers Professional Responsibility were amended effective March 1, 1991, to provide immunity from suit for those serving as probation supervisors.

A third annual meeting for supervisors was held in connection with the Professional Responsibility fall seminar. Volunteer supervisors continue to play an important role in the success of probation.

1. File Totals.

Total probation files as of 1/1/90	63
Probation files opened in 1990	32
Probations files closed in 1990	27
Total probation files as of 1/1/91	68

2. 95 attorneys were on probation during some portion of 1990.

   a. 46 Court-ordered probations (21 followed reinstatement after suspension)
      24 supervised (9 reinstated after suspension)
      22 unsupervised (12 reinstated after suspension)

   b. 49 stipulated private probations
      25 supervised
      24 unsupervised

3. Files Involving:

Client-Related Violations	70
Non-Client-Related Violations	25

4. Areas of Misconduct*

Neglect/Non-comm.	46	Conflict of Interest	6
Taxes	19	Criminal Conduct	4
Books and Records	17	Failure to Return Client Property/File	5
Misrepresentation	11	Unauthorized Practice	4
Non-cooperation	10	Illegal fees	0
Misappropriation	6		
Other	2		

13 files involved chemical dependency (abuse of alcohol/drugs); 12 involved psychological disorder.

5. Closed in 1990: 27

Successfully completed probations	21
Revoked probations	6

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

6. <u>Probation extended in 1990</u>: 4

7. <u>Time by Probation Department Staff (per week)</u>:

6.0 hrs. Attorney
12.0 hrs. Legal Assistant

F. <u>Advisory Opinions</u>.

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

The number of telephone advisory opinions increased for the third consecutive year. During 1990, 1,130 telephone opinions were issued. In 1989, 948 telephone opinions were issued. There were 26 written advisory opinions issued in 1990, compared to 37 in 1989.

The major areas of inquiry in 1990 were as follows:

Area	Percent
Conflict of Interest	22%
Client Confidences	10%
Advertising and Solicitation	8%
Fee Agreements and Fees	7%
Trust Accounts	6%
Return of Client Files	6%

Five assistant directors issued advisory opinions on behalf of the Director's Office in 1990. One additional assistant director was assigned to issue opinions in 1990 due to the increasing demand and the extended leave of an assistant director. In 1990, the assistant directors devoted 290.10 hours issuing advisory opinions. This figure represents an increase of approximately 40 hours over 1989.

G. Judgments and Collections.

Costs awarded in 1990 increased substantially (about $26,000) over those awarded in 1989. Costs collected in 1990 nearly doubled those collected in 1989.

The Director's Office began taking more aggressive collection measures in 1990. Judgments were routinely docketed in the county where the attorney resides. The Director has also employed the summary execution statute to execute upon funds at financial institutions and upon earnings. To date, $1,354 has been collected through the summary execution process.

1.	Costs Awarded in 1990. (47 attorneys)	$58,866.63
2.	Total Costs Collected in 1990	27,196.75
3.	Costs Collected in 1990 for Dispositions prior to 1990, including interest (12 attorneys)	11,158.18
4.	Costs Awarded in 1991 (16 attorneys)	15,424.77
5.	Costs Collected in 1991	13,746.06
6.	Unpaid Judgments as of January 1, 1990 (1980-1989)	88,824.00
7.	National Discipline Data Bank Reports	71

H. Professional Corporations.

Under Minn. Stat. § 319A.18, the Lawyers Professional Responsibility Board is granted the authority to make such rules as are necessary to carry out the provisions of the Professional Corporations Act. The Professional Corporations Act contains limitations on the structure and operation of professional corporations. The Act also requires that annual reports, accompanied by a filing fee, be filed with the Board. The Board has not formally adopted any rules in this area. The Director's Office has, since 1973, monitored the reporting requirements of the statute. Annual report forms with certain minimal documentation requirements and filing fees are sought from all known legal professional corporations. Although the statutory authority exists to revoke the corporate charter of professional corporations which fail to comply with the reporting requirements, the cost of this has proven to be prohibitive.

The following are the statistics for the professional corporation department as of April 30, 1991:

723	@	$ 25.00	$18,075.00
36	@	100.00	3,600.00
			21,675.00
6	for	1,025.00*	1,025.00
			22,700.00

*Funds collected for fees owed for 1989 and prior years.

Total Attorney Hours: 17

Total Non-attorney Hours: 229

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

I. Overdraft Notification.

1. Introduction.

Effective January 1, 1990, the Supreme Court amended Rule 1.15, MRPC, to require financial institutions to notify the Director's Office of trust account overdrafts. The rule was recommended to the Court by the MSBA and the Lawyers Board. An article describing the rule, including its expected benefits and its limits, is attached at A. 10.

In the few months of its operation, the overdraft notice rule appears to provide opportunities for educating attorneys about proper trust account practices. Attorney mistakes resulting in overdrafts are generally correctable through instruction rather than discipline. Only three reports received through May 15, 1991, have led to petitions for disciplinary action; and none involve large scale misappropriation.

2. Cooperation of Banks.

From May through August 1990, the Director's Office contacted all of the financial institutions with IOLTA accounts. All but a few executed agreements to report trust account overdrafts. On August 4, 1990, a list of the 683 institutions which had agreed to report trust account overdrafts was published in Finance and Commerce. An updated list of approved

institutions will be published annually. An article was also published in the Minnesota Banking Journal notifying Minnesota financial institutions of the overdraft notification program. In early August the Director's Office also contacted 71 attorneys whose financial institution had failed to sign an agreement. All of the attorneys either moved their trust accounts or persuaded their financial institution to execute the overdraft notification agreement.

3. Implementation.

On August 1, 1990, approved institutions began reporting trust account overdrafts to the Director's Office. The trust account overdraft notification program is handled primarily by an assistant director and a legal assistant in the Director's Office.

A typical overdraft is processed as follows. The overdraft notice is mailed to the attorney or firm, with a letter requesting (1) a copy of the check creating the overdraft; (2) the identity of the client on whose behalf the check was issued; (3) a description of the reason why the overdraft resulted; (4) copies of the last three monthly bank statements; and (5) proof that funds have been deposited to cover the overdraft and any overdraft charges. The attorney is asked to respond within ten days. No discipline investigation file is opened at this stage. It is often necessary to request further documentation or explanation before the inquiry can be terminated.

From August 1, 1990, to May 15, 1991, the Director's Office received 98 overdraft notices. Of these overdrafts 75 resulted in terminated inquiries, 10 resulted in disciplinary file

openings, 6 were on accounts already the subject of a disciplinary file, and 7 are still pending.

4. Terminated Inquiries.

If the attorney's response and the documents provided adequately explain the overdraft, the inquiry is terminated by thanking the attorney for his/her cooperation and, if necessary, recommending improvements in trust account practices. Statistics for terminated inquiries and recommendations from August 1, 1990, to May 15, 1991, are set forth below.

Overdraft causes resulting in terminated inquiries:

Cause	Number
Untimely deposits	27
Service charge deduction	11
Bank debiting error	6
Bank hold on funds drawn	4
Bank crediting error	4
Improper endorsement	4
Not a trust account	4
Deposit to wrong account	4
Mathematical/clerical error	4
Check written in error	1
Other	6

Improvements recommended in terminated inquiries:

Improvement	Number
Proper form of client subsidiary ledgers and other books	10
Commingling problems	2
Insure deposit made before checks issued	4
Reimburse check and other charges	2
Non-Lawyer signatory	2
Negotiation of settlement check without client's signature	1
All withdrawals to bear attorney's signature	1
Transfer of unearned retainer	1

5. Disciplinary File Openings.

If the response does not adequately explain the overdraft or significant problems are identified in reviewing the response and supporting documents, a disciplinary investigation is commenced

and the attorney is notified. Disciplinary investigations are also commenced if the attorney fails to respond to the overdraft notice. Statistics for disciplinary file openings from August 1, 1990, to May 15, 1991, are set forth below:

Reasons for disciplinary file openings (more than one reason may apply to a single file opening):

Inadequate books and records	6
Commingling	4
Trust account checks signed by non-lawyer	3
Response prepared by non-lawyer	2
Incomplete reimbursement of overdraft	2
Inadequate response from attorney	2
Repeated trust account overdrafts	2
Workers' comp settlement mishandled	1
Improper deposit practices	1
Shortages exist	1

Only one of the disciplinary files--a dismissal-- has been resolved. All of the others are pending in various stages of investigation or prosecution.

6. Time Requirements.

Set forth below are the Director's Office staff time requirements from August 1, 1990, to May 15, 1991, to administer the overdraft notification program.

Attorney	6 hours/week
Legal assistant	
5/1/90 to 8/1/90	9.75 hours/week
8/1/90 to 5/15/91	11.50 hours/week
Clerical	1.50 hours/week

J. Complainant Appeals.

During 1990, the Director's office received 234 complainant appeals, compared to 211 such appeals in 1989. This is approximately 19 percent of files closed. Board members made 234

determinations, eleven of which recommended further investigation and three of which were directed to be heard before a panel. The remainder affirmed the Director's disposition. A total of 55 clerical hours were spent in 1990 processing the appeal files, as well as an unrecorded amount of attorney time.

K. Disclosure.

1. Source and Number of Requests for Disclosure. Calendar Year 1990.

	# of Requests	# of Attorneys	Discipline Imposed	Matters Pending
A. National Conf. of Bar Examiners	136	136	2	1
B. Individual Attorneys	7	7	2	1
C. Local Referral Services				
1. SMRLS	30	54	0	0
2. RCBA	39	149	0	0
D. Governor's Office	12	73	2	1
E. Other State Disc. Counsels/ State Bars or Federal Juris.	110	113	2	1
F. F.B.I.	17	17	1	0
G. Board of Law Examiners	0	0	0	0
H. MSBA: Specialist Cert. Program	27	153	16	2
TOTAL	378	702	25	6

2. Department Function.

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

There was a 47 percent increase in the number of disclosures in 1988 compared to 1987, due principally to requests from the newly established specialist certification program of the Minnesota State Bar Association. The department received an even larger number of requests from the MSBA in 1989. However, in 1990 the number of MSBA requests dropped significantly, and the total number of disclosures in 1990 was 14 percent lower than in 1989.

Responding to disclosure requests continues to require a significant amount of clerical time.

V. LAWYERS BOARD.

Much of the work of the Lawyers Board is done by its three-member hearing panels, by its individual members considering complainant appeals and by its five-member Executive Committee. With the increased numbers of complaints and serious charges of unprofessional conduct, and with the increased decision-making discretion resulting from the rule amendments, the work assignments of the Board members have also increased.

The Board has taken a leadership role in keeping various professional rules up to date, particularly the procedural disciplinary rules. In 1990-1 the Board formulated and proposed to the Court numerous amendments to the Rules on Lawyers Professional Responsibility. The amendments were adopted with a minor exception. Since the Board's adoption of a Panel Manual, describing policies and procedures for Panel hearings, it has been necessary to update the manual whenever the rules are changed. The Board has again done this.

The Board or its Executive Committee also commented on certain ABA proposed new Rules of Professional Conduct which were being considered by the MSBA standing committee; and commented on the proposed Uniform Local Rule regarding the "Role of Attorneys."

Pursuant to Rule 4(c), RLPR, the Board "may, from time to time, issue opinions on questions of professional conduct." One of the most frequent and controversial questions, particularly among family lawyers, in recent years, have been the status of attorney liens on homesteads after Northwestern National Bank of So. St. Paul v. Kroll, 306 N.W.2d 104 (Minn. 1981). The Board has issued Opinion No. 14, dealing with this subject. It appears that the opinion has successfully reduced controversy on the point. An article describing the opinion and controversy is attached at A. 5.

A problem faced by the Board and Director's Office from time to time over the years, but especially in 1990-1, is the problem of complainants who file numerous and repetitious complaints. One complainant filed complaints against everybody in the discipline system who did not take the action the complainant desired on his original complaint; and then filed still more complaints against those--including non-lawyers--who processed or decided his appeals of his initial round of complaints. After discussion between the Board and Director, a policy was adopted for handling unreasonably multiplied or vexatious complaints. The policy turns on the judgment that a complaint based on essentially repetitious facts against another person in or out of

the discipline system is not a new complaint that requires new processing, appeal rights, etc.

VI. DISTRICT ETHICS COMMITTEES.

The District Ethics Committees (DECs) continue to meet the challenge of an increased workload without a discernible decrease in the quality of investigations or an increase in the time taken to complete investigations. The volume of files referred to the DECs, while slightly lower than last year, remains higher than in years past. The overall monthly average number of files at the DECs for this year was 172. For last year it was 178. For the year before it was only 140. There were 151 files pending at the DECs in April 1990. Other DEC statistics are summarized at pp. 6-7 above.

The efforts of the volunteer members of the DECs have greatly contributed to the disciplinary system. The DECs are an important part of the disciplinary process. They provide an initial peer review of complaints with the opportunity for input from public members. The quality of the DEC investigative reports remains high. The Director's Office continues to serve as a resource to the DEC investigators. An Assistant Director is assigned to each DEC as a liaison, available for assistance when any questions or problems might arise in the course of an investigation.

VII. FY'92 GOALS AND OBJECTIVES.

The first comprehensive, nationwide review of state professional responsibility systems by the ABA in 20 years was received on May 21. It is expected to be presented at the February 1992 ABA mid-year meeting. The Report of the Commission

on Evaluation of Disciplinary Enforcement makes 22 recommendations for ABA adoption as standards of professional responsibility systems. Attached at A. 11-19 are the black-letter Recommendations.

Although Minnesota has implemented almost all of the recommendations from the 1970 ABA report, many of the 1991 recommendations would require major changes in Minnesota. Among these would be:

- An open records system.
- "Expanded regulation" to include lawyer assistance, mediation, alternate dispute resolution, etc.
- Streamline procedures for "minor misconduct."
- A random audit program.
- An apparently diminished or greatly altered role for district ethics committees.
- Advisory opinions should no longer be given by the Director's Office.

The Lawyers Board expects promptly to begin review of the Minnesota system in light of the ABA report and recommendations. Although it is not presently known whether other groups may also be involved in such a review, the Lawyers Board expects to play a major role in any review. This may well be the Board's principal activity in the coming year, or even longer.

The Board opinion committee will be considering recommendation to the Board of an opinion concerning advance retainer fees. The Court has recently addressed this subject at some length in In re Lochow.

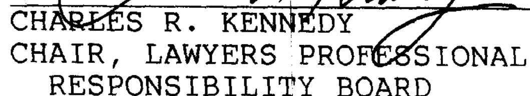
At its June meeting the Board will consider what position, if any, it will take on the amendments to the Rules of Professional Conduct that the MSBA will be considering at its June convention. If the MSBA decides that it is the time to review disciplinary rules governing advertising, the Board may also consider such matters.

When is it appropriate to seek temporary suspension of an attorney during discipline proceedings? In the great majority of cases of clear and extremely serious misconduct stipulations for temporary suspension have been reached and approved by the Court in the last several years. Contested petitions have been decided without opinion or with a very brief statement of reasons. The Board and Director's Office may need to consider the general principles for seeking such interim suspensions.

Last year's report noted the beginning of the rise in the number of complaints and misappropriation cases that marked 1990 and early 1991. By statistical measures, the Court, Board and Office have dealt promptly and effectively with these challenges. The troubling question remains, however, of the profession's understanding of itself, and its image to the public, when every month brings news of another attorney who has taken a large amount of client funds.

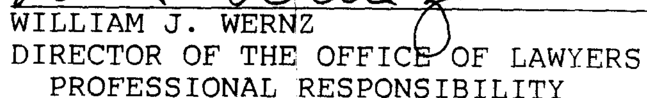
Dated: June 14, 1991.

Respectfully submitted,



CHARLES R. KENNEDY
CHAIR, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

and



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

PROFESSIONAL RESPONSIBILITY BOARD/*William J. Wernz*

Picking Up the Pieces . . .

Among the little-known functions of the Office of Lawyers Professional Responsibility — just above administering the professional corporations statute — is its trusteeship function. When a lawyer becomes disabled, dies suddenly, or absconds — and no one makes arrangements for the clients — the Minnesota Supreme Court may appoint a trustee under Rule 27, Rules on Lawyers Professional Responsibility.

Unfortunately, trusteeships have recently become a regular activity of the director's office. In the 1980s there were about ten trusteeships. Between December 1990 and February 1991 there were four more initiated. The director's office did not first serve as a trustee until 1983.

Less formal solutions to the problems of lawyer disability, disappearance, and death were apparently the rule in years gone by. Other lawyers, employees, conservators, and executors — as well as family members and others — have done informally what the trustee now does formally. Perhaps more lawyers practice not just by themselves, but in a way unconnected with others, so that the traditional networks are not available. Perhaps those who might have helped informally now worry more about authorizations and liability exposures. Whenever possible, this office tries to foster and support such informal solutions to problems, rather than seeking appointment as trustee.

What does a trustee for a law practice do — and not do? The trustee does not take on the duties of the lawyer. Nor does the trustee usually become involved in the financial affairs of the attorney, as a bankruptcy trustee would. An exception would be made for trust account funds, but there rarely are any. If there are assets belonging to the attorney, another fiduciary, whose duty is to the attorney or creditors, may need to be appointed.

The first work of the trustee is dealing with emergencies. The events giving rise to a trusteeship are often sudden and unexpected. Opposing parties, clients, and courts must learn of the lawyer's unavailability. The client must learn of the need for substitute counsel, if the file is open, and be told how to retrieve the file.

The trustee must bring some order to the law office. Opening the mail and filing have to be done. One attorney's filing practice for a year or more was to heap everything on his desk: unrecorded deeds, original wills, unopened letters from his children, letters from the Lawyers Board, pleadings and notices from courts, all mixed indiscriminately and generally unopened. Sometimes evidence of criminal activity, such as theft or unlawful flight (or in one case, of murder) may be mixed in with confidential legal documents. Temporary clerical help may have to be hired. The sorting and organizing and responding to emergencies must be done as promptly as possible.

> *"When a lawyer becomes disabled, dies suddenly, or absconds…the Minnesota Supreme Court may appoint a trustee…"*

The law office may need to be secured, or arrangements made for other space. The landlord may already be contemplating eviction and perhaps destruction or storage of files. An assistant director, new to the office, was once assigned the off-the-job-description task of removing 850 pounds of lawyer files from a warehouse. A broken shock absorber made him ask whether this was really better than his first assignment in private practice — attempting replevin of a Chihuahua.

The trustee's main work involves dealing with client files. The law office files are usually removed to the director's office. The files are then inventoried. Clients are notified of the lawyer's situation and arrangements to obtain their files. Open file notices are sent first, then closed files.

Clients, adversaries, and creditors often call the trustee. Clients who have paid retainers for work that remains incomplete, or never begun, are understandably distraught or irate. If the lawyer accepted the retainer without any intent to do the work, a client security fund claim may be made.

The magnitude of trustee work varies greatly. Sometimes there are thousands of files and documents to be managed. Old files in a basement or garage must sometimes be examined at least cursorily to see whether they should be collected and returned. Usually no individual file reviews are undertaken to determine whether there are especially important documents. If wills, deeds, and the like are identified, special measures will be taken.

Last year three attorneys in private practice volunteered their time and services to pick up the pieces when a lawyer in solo practice suffered a severe and prolonged nervous breakdown. Donna Roback, Doug Hedin, and Bill Foster spent hundreds of hours reviewing files, meeting with clients, putting out fires, and generally trying to mitigate the damage to clients by the collapse of a busy law practice. Because two of them practiced in the same field as the disabled lawyer, they were especially helpful to the abandoned clients. Some of the clients, particularly those who had paid retainers for incomplete services, were too angry to be appreciative of the trustees' work. One client was suspicious of getting free legal help and checked to see whether the trustee got money "under the table!" Several years ago lawyers Virgil Herrick and David Newman volunteered their help as trustees to deal with the files Mark Sampson left behind. The Lawyers Board provides clerical support, forms, and advice to volunteer trustees, and

Supreme Court appointments include liability protection. Volunteers deserve recognition.

With or without volunteers, trusteeships are expensive. Even with computerized systems, handling hundreds or thousands of files and documents requires large amounts of clerical time. Recently, our counterparts in another state called to learn how lawyer trusteeships are handled in Minnesota. That state had spent over $20,000 in fees paid to lawyers in private practice to handle a single trusteeship. Several states have recently implemented lawyer trustee programs patterned on those developed in Minnesota.

"An assistant director was once assigned the task of removing 850 pounds of lawyer files from a warehouse."

The Minnesota Supreme Court authorizes and approves law office trustee actions. The trustee reports to the Court, which ultimately issues a discharge order when the trustee's work is done. The order usually includes a period for retention of files and a date for file destruction.

The director's office cannot become trustee, or find volunteer trustees, in any significant percentage of situations involving the death, disappearance, or disabilities of solo practitioners. Less formal procedures have to be used. Surely practicing lawyers — whether they are office sharers, friends, neighbors, or just volunteers — have a great role to play in seeing that somebody picks up the pieces when a law office suddenly falls apart.

PROFESSIONAL RESPONSIBILITY BOARD/*William J. Wernz*

Proposed Procedural Changes . . .

The Lawyers Board has petitioned the Minnesota Supreme Court to amend the procedural Rules on Lawyers Professional Responsibility in several ways. Copies of the petition are available from the Office of Lawyers Professional Responsibility. The most important of the proposed rule changes are as follows.

Complainant Access to Attorney's Response. Under Rule 20, investigations in discipline files are confidential, with several exceptions. The complainant is informed of the progress of the proceedings and receives a copy of the final disposition. Other file documents may be shared with the complainant if an investigative purpose is served. The amendment would provide the respondent-attorney's response to the complaint to the complainant, if the complainant is or was a client. The current practice is to share the response with the client-complainant on most occasions because it often serves an investigative purpose.

Complainant Appeals. In 1986, on recommendation of the Dreher Committee, the Supreme Court increased the options available to Lawyers Board members on complainant appeals from dispositions by the Director. An additional option is now proposed, namely that if a district committee recommends discipline, but the Director instead dismisses, the board member may instruct the Director to issue an admonition.

Panel Options. The Dreher Committee also recommended additional authority for Lawyers Board hearing panels. The board now believes that it would be appropriate for a hearing panel to have authority to issue an admonition, if it concluded after hearing that an attorney engaged in misconduct, but that the conduct was not serious enough to warrant the public discipline sought by the Director.

Conflicts and Disqualification of the Director's Office. On recommendation of the Dreher Committee a rule was adopted disqualifying a district committee investigator or the equivalent in the Director's Office in the same circumstances which would require judicial disqualification. Because the Director's Office is in some ways not analogous to a court, the disqualification standard should be tailored better to the circumstances, to require disqualification only when the office employee's activities *outside the office* would be such as to require judicial disqualification. Thus, an assistant director who previously investigated the same attorney would not thereby be disqualified from a second investigation.

Probations. Since approximately 1984, private, stipulated probations have routinely included certain "boilerplate" provisions, including waiver of panel hearing rights if the stipulated conditions are not met. Several rules changes are proposed to make a matter of rule what has become a common matter of agreement. In the case of Supreme Court probations, breaches also have been followed by filing of a public petition without panel hearing, on a theory of continuing court jurisdiction. The practice would also be formally authorized by rule change.

"Several rules changes are proposed to make a matter of rule what has become a common matter of agreement."

Reciprocal Discipline. The rise in number of attorneys licensed in more than one jurisdiction has led to a number of ancillary discipline proceedings in Minnesota for attorneys whose primary practices are elsewhere. A reciprocal discipline rule, in language condensed from the ABA Model version, is proposed for Minnesota to regularize this process.

Reinstatement by Affidavit. Suspensions in the range of one to six months have become fairly common in Minnesota in recent years. With short suspensions, the general requirement for a reinstatement hearing is usually waived. However, the suspended attorney must meet certain requirements before reinstatement is possible. Procedures that have come into use informally should be adopted in the form of a rule.

Disbursements. Under current rule the prevailing party in a Supreme Court disciplinary proceeding recovers costs and disbursements incurred *after* the petition is filed. Often the Director's largest disbursements are for investigative expenses, including sworn statements and auditing costs, incurred *before* the facts are clear enough to bring formal charges. A "user fee" concept of revenue-raising would suggest that such costs be borne by the publicly disciplined lawyer rather than by the other licensed fee-paying lawyers of the state.

Disciplined Lawyer's Notice to Clients. A publicly disciplined lawyer is currently required to notify clients and others of an "inability to represent the client." The proposed rule change would require the lawyer to furnish copies of the disciplinary decision. The rationale for the amendment is that a client who is deciding whether to wait for further services should know the reason for the lawyer's inability to provide representation.

District Committee Service. The large increase in complaints in 1989-90 has strained the resources of district committees. A rule change is proposed to lengthen the maximum period of service of committee investigators, from two three-year terms to two consecutive three-year terms and four three-year terms altogether.

The Rules on Lawyers Professional Responsibility were last amended January 1, 1989. The Court's normal procedure, unless it regards rules changes as merely administrative, is to give notice of a comment and public hearing on the proposed amendments.

A.3

DEC SUMMARY AND REPORT - APRIL 1991

MONTHS OPEN	12	11	10	9	8	7	6	5	4	3	2	1	0	TOTAL			DEC STATUS CODES
DEC #/ATTY																	
DEC 1 - KLJ							1	1	0	0	2	4	0	8		1	Assigned to DEC
DEC 2 - WWL										3	12	8	8	31		2	Reassigned to DEC
DEC 3 - BMS										1	0	0	1	2		3	DEC 1 to be issued
DEC 4 - PRB			1	0	1	1	1	4	1	13	18	21	16	77		4	DEC 2 to be issued
DEC 5 - KLJ												1	0	1		5	DEC 3 to be issued
DEC 6 - BMS													0	0		6	DEC 4A to be issued
DEC 7 - BMS											2	0	3	5		7	DEC 4B to be issued
DEC 8 - BMS											1	0	0	1		8	DEC 5 to be issued
DEC 9 - BMS														0		9	Extension granted
DEC 10 - BMS														0		10	Report at DEC
DEC 11 - WWL											2	0	1	3		70	Status of file requested
DEC 12 - KLJ											1	1	4	6		71	Min rec'd - wait file
DEC 13 - BMS										1	0	0	0	1		72	Min rec'd - refer panel
DEC 14 - WWL										1	1	0	0	2		73	DEC 1B to be issued
DEC 15 - WWL											1	0	2	3		74	Report rec'd; will be taken
DEC 16 - KLJ														0			off next month's report
DEC 17 - KLJ														0			
DEC 18 - KLJ									1	1	2	0	0	4			
DEC 19 - KLJ											2	0	1	3			
DEC 20 - WWL														0			
DEC 21 - KLJ											1	2	1	4			
														0			
TOTAL FILES	0	0	1	0	1	1	2	5	2	20	45	37	37	151			
														0			
NO. OF MOS.	0	0	10	0	8	7	12	25	8	60	90	37	0	257			
AVERAGE NO. OF MONTHS IN DEC						1.7											
*2ND DEC AVERAGE						1.3											
**4TH DEC AVERAGE						2											
ALL OTHER DECS AVERAGE						1.5											

Attorney Liens on Homesteads...

It is professional misconduct for a lawyer to file an attorney lien against a client's homestead or the client's interest in the homestead without first obtaining a legal waiver of the client's homestead exemption. The homestead exemption waiver must be a written document separate and apart from the fee agreement.

Lawyers Professional Responsibility Board Opinion No. 14, adopted June 15, 1990, attempts to settle some of the questions surrounding the nagging issue of attorney liens on homesteads. The issues have been debated for nearly ten years.

Northwestern National Bank v. Kroll, 306 N.W.2d 104 (Minn. 1981) held that the homestead exemption precludes foreclosure of an attorney lien. *Kroll* suggested, and subsequent cases stated, that "an attorney's lien cannot attach to exempt property."[1] Some attorneys argued that even though foreclosure was forbidden and the attorney lien could not "attach," still the lien could be filed. A *Bench & Bar* article in November 1982 indicated the Board's and Director's skepticism regarding this practice.

The question of attorney liens on homesteads becomes one of professional responsibility because of two rules of professional conduct: Rule 1.8 (j)(1) forbids an attorney to acquire a proprietary interest in the subject matter of litigation except "a lien granted by law"; and Rule 3.1 forbids taking frivolous actions in legal proceedings. Both of these rules harken to the civil law, as do several other rules of professional conduct.

In several of its earlier opinions the Board has interpreted the application of civil law to professional conduct.[2] Opinions issued by the Board often attempt to address subjects that have produced friction between attorneys and clients. For example, the opinions regulating copying costs and return of the file upon conclusion of representation appear to have successfully regulated these practices so as to reduce complaints.

The practice by some attorneys of filing liens on homesteads in certain circumstances has produced many inquiries and complaints. The problem is particularly acute when an attorney files a lien without notifying the client, often in a marriage disolution context. Sometime later, when the client attempts to sell the home, a title examination reveals the attorney lien. Often there is no time to litigate the reasonableness of the lien amount and the escrow requirements are beyond the seller's capability. An attorney with a lien that could not be foreclosed and did not even "attach" to the homestead may thus obtain payment of a fee which the client had no realistic opportunity to dispute.

Attorney liens on homesteads, especially in the marriage dissolution context, may be viewed from another perspective. An experienced family court judge and the Family Law Section of the MSBA wrote to the Board in 1990, as the Hennepin County Bar Association had in 1982, stating their views that forbidding the filing of attorney liens on homesteads would have a very negative effect on the ability of low-income clients to obtain family law representation. Since women were often without resources other than the homestead to secure legal representation, they especially would be adversely affected by a general prohibition against attorney liens. These problems already existed to a certain extent in 1982, when the Lawyers Board first considered the attorney-lien-on-homestead issue, and declined to issue an opinion. Since that time, case law developments have made a middle-ground position more clearly viable. This position involves voluntary waiver of the homestead exemption, with respect to the filing of an attorney lien.

In re Guardianship of Huesman, 381 N.W.2d 73 (Minn. App. 1986) stated,

> The owner of a homestead may waive his homestead rights, even though they be constitutional rights, by an act which evidences an unequivocal intention to do so.[3]

The Board's opinion is that with a proper waiver an attorney lien may be filed against a homestead.

Opinion 14 seeks to put an end to the practice of filing secret liens against homesteads and collecting on them in what amounts to a coercive manner. This heavy-handed collection method could not be justified by any reference to the client's need to obtain legal representation. If clients have such a need, they should decide knowingly and with full information whether they wish to subject the homestead to a lien in order to obtain legal services. The Rules of Professional Conduct generally have advanced the idea of enhancing clients'

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ability to knowingly consent to what they perceive to be in their interests.

Part of the Board's opinion is that the homestead lien waiver must be written, and in a document separate from the fee agreement. This should enhance the clients' awareness that they are surrendering valuable rights in order to obtain legal services.

Opinion 14 does not attempt to address all professional responsibility questions connected with attorney liens on homesteads. For example, the question of what makes a waiver "valid" is left to the civil law.[4] In *Huesman* the court noted that the attorney apparently did not explain to the client the legal effects of a lien.

Among the duties assigned by the Minnesota Supreme Court to the Lawyers Board are from time to time to "issue opinions on questions of professional conduct." No procedures are prescribed for the opinion-issuing function. It has been suggested that the Board should give formal notice of a proposed opinion and then receive comment over a period of time before adopting an opinion. This practice has never been followed in Minnesota, nor in any other states brought to the Board's attention. The Board considered this procedural recommendation and decided that normally it will issue opinions without a notice and comment period.

The Board's opinion committee, chaired by Minneapolis attorney Rollin Whitcomb, met many times during 1989 and 1990 to try to deal with the difficult subject of attorney homestead liens. The points of view of lawyers, including several family lawyers, and nonlawyers were vigorously presented during a lengthy Board meeting on the subject. The Board recognizes that its opinion may need review in the future if the Court or the Legislature modifies the substantive law.

Because many of the Rules of Professional Conduct thrust toward areas of substantive law, the Board believes that its opinion-issuing function will sometimes entail consideration of the substantive law. The Board does not intend to create or promulgate laws or rules, but rather to discern what the law is and how it connects with certain of the professional rules.

The Board's other opinions were most recently reprinted in the November 1989 *Bench & Bar*. Opinion 3, regarding part-time judges, may need revision in light of expected changes in the Code of Judicial Conduct.

NOTES

1 In re Guardianship of Huesman, *381 N.W.2d 73, 77 (Minn. App. 1986)*; In re Beal, *374 N.W.2d 715 (Minn. 1985)*.

2 *For example, Opinions 11 and 13 interpret Rule 1.16 (d) which requires upon termination of representation that an attorney give to the client the documents "to which the client is entitled [by law]. . . ."*

3 *Citing* Argonaut Insurance Co. v. Cooper, *261 N.W.2d 743, 744 (Minn. 1978)*. Huesman *declined to uphold enforcement of an attorney lien against a homestead, but apparently only because the exemption waiver was not unequivocal. The lien waiver referred to "any property we [the clients] may own," without further specificity.*

4 *Clarity and specificity are required for a valid waiver. See* Huesman, *381 N.W.2d 73 and cases cited therein.*

LAWYERS PROFESSIONAL RESPONSIBILITY '90
ANNUAL SEMINAR
Friday, October 19, 1990
Sheraton Midway St. Paul
I-94 and Hamline
St. Paul, MN 55104
(612) 642-1234

PROGRAM SCHEDULE

8:30 - 9:00 - Coffee and Registration.

9:00 - 10:00 - **Issues Confronting Attorney Discipline Systems Nationwide.**

Raymond R. Trombadore, Esq.
Acting Chair, ABA Commission on Evaluation of Disciplinary Enforcement
Sommerville, New Jersey

10:00 - 10:45 - **Should Attorney Discipline Complaints and Records be Public?**

George A. Riemer
General Counsel
Oregon State Bar

10:45 - 11:00 - Break.

11:00 - 12:00 - **New Developments in Minnesota.**

R. Walter Bachman, Jr., Esq.
Minneapolis

Rollin J. Whitcomb, Esq.
Lawyers Professional Responsibility Board Member
Minneapolis

William J. Wernz, Esq., Director
Office of Lawyers Professional Responsibility

12:00 - 1:00 - Lunch (provided).

1:00 - 2:00 - **Should there be a Disciplinary Rule Against Illegal Discrimination?**

Phyllis Karasov, Esq.
St. Paul

Judith Langevin, Esq.
Minneapolis

Glenn Oliver, Esq.
Minneapolis

Betty M. Shaw, Senior Assistant Director
Office of Lawyers Professional Responsibility

2:00 - 3:30 - District Ethics Committee Workshop.

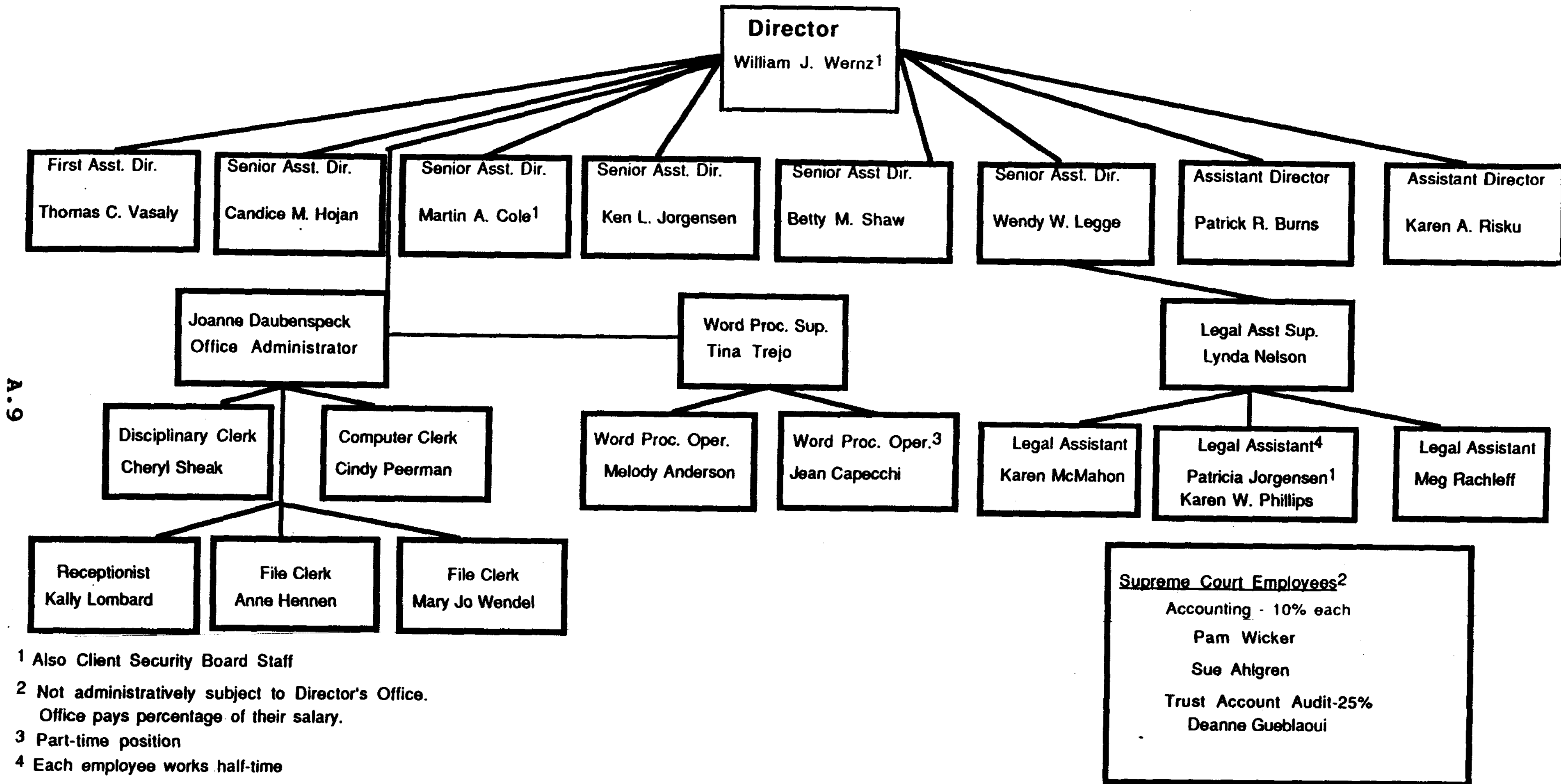
FY'91 Summary 4/30/91

83% of year passed - 17% remains	Budget	YTD Expend	%	Projected Year-End Expend	Project Variance
1. Salaries	$1,004,460	$744,811	74%	$928,563	($75,897)
2. Rents & Leases	$87,803	$73,246	83%	$87,803	$0
3. Advertising	$900	$1,552	172%	$1,862	$962
4. Repairs	$10,500	$8,577	82%	$10,500	$0
5. Bonds & Insurance	$3,000	$0	0%	$3,000	$0
6. Printing & Binding	$6,000	$6,185	103%	$6,937	$937
7. Prof. & Tech.	$29,000	$18,666	64%	$22,399	($6,601)
8. Data Processing	$50,000	$0	0%	$10,000	($40,000)
9. Purchased Services	$5,700	$9,376	164%	$11,200	$5,500
10. Communications	$19,000	$19,759	104%	$23,711	$4,711
11. In-State Travel	$9,200	$2,322	25%	$2,786	($6,414)
12. Out-State Travel	$8,100	$3,840	47%	$4,608	($3,492)
13. Fees Fixed Charges	$4,600	$2,880	63%	$2,999	($1,601)
14. Supplies	$26,500	$23,113	87%	$27,035	$535
15. Equipment	$30,000	$11,133	37%	$15,600	($14,400)
Total	**$1,294,763**	**$925,460**	**71%**	**$1,159,004**	**($135,759)**
		4/30/90	=	80%	
		4/30/89	=	72%	

Projected Year-End Expenditures Calculated as Follows:

1. See attachment A
2. Rents and Leases - 12 months rent
3. Based on expend to date divided by 10 and multiplied by 12
4. Includes service contracts still outstanding
5. Insurance premiums paid in May 1991
6. Same as 3 (minus U.S. Sup. Ct. brief printing)
7. Same as 3
   As of 7/1/89 Office no longer pays for Atty. General service
8. $6,000 consultants to study TCIS vs. independent system $4,000 TCIS
   $40,000 for new computer system carried forward to FY'92
9. Additional Board meeting expenses & indep contract for trusteeship
10. Same as 3
11. Same as 3
12. Same as 3
13. Same as 3 (minus memberships paid annually)
14. Same as 3 (minus furniture and seminar expenses)
15. $3,000 furniture & equip, $7,000 four Mac computers, $3,600 copier
    $2,000 shelving, $15,000 for new computer carried into FY'92

4/91 **Office of the Director of Lawyers Professional Responsibility**



Trust Account Overdraft Notice Rule . . .

The Minnesota Supreme Court and the Lawyers Board have responded to the wave of lawyer misappropriations in recent years by increasing regulation and education. Board Opinion No. 9 was issued and amended to specify the trust account books and records that must be kept. The Court requires lawyers to certify on their annual registration statements that they either keep the required books and records or do not handle trust monies. The Client Security Board was established to compensate victims of lawyer dishonesty. The Director's Office has published and distributed a booklet describing and illustrating how trust account books are to be kept. Prompt and public disciplinary actions are taken against lawyers who mishandle monies. The most recent action is a trust account overdraft notice program, authorized by the Court on January 1.

Beginning August 1, 1990, the Director's Office will receive copies of verdraft notices on attorney trust accounts. Attorneys must maintain trust accounts only in approved financial institutions.

To be approved for handling attorney trust accounts, the financial institution must agree in writing to report to the Director's Office whenever any "properly payable attorney trust account instrument is presented against . . . insufficient funds, irrespective of whether or not the instrument is honored." Rule 1.15(j), R. Prof. Con. All financial institutions maintaining Interest on Lawyer Trust Account (IOLTA) accounts have been notified of the rule change, and most have agreed to participate in the overdraft notice program. Those who have so agreed have been approved to maintain lawyer trust accounts. A list of approved institutions will be published in *Finance & Commerce* in August 1990, and annually thereafter. Attorneys maintaining trust accounts in nonapproved institutions will be notified that they must remove their trust accounts from such institutions.

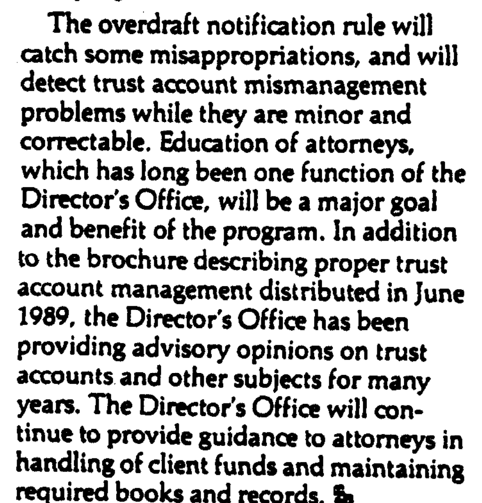
Trust account overdraft notices will be handled by the Director's Office separately from disciplinary complaints. Rule 1.15(k), R. Prof. Con., requires the financial institution to send an overdraft notice to the Director's Office simultaneously with notice to the attorney. Upon receipt of the notice, the Director's Office will require the attorney or law firm identified in the notice to provide an explanation of the overdraft. The explanation should include documentation of the reason for the overdraft. For example, if it is claimed a check was incorrectly deposited into another account by office personnel, an affidavit from the office personnel together with a copy of the dated deposit slip showing deposit into the incorrect account will be required. If the explanation and documentation is satisfactory, a letter closing the inquiry will be issued, and no disciplinary file will be opened. The Director's Office will maintain records of overdraft notices for three years.

If the explanation for the overdraft is unsatisfactory, if no explanation is made, or if there is a pattern of overdrafts, a disciplinary file may be opened. The Director will then request further explanation or an audit of the attorney's trust account.

Based on experience in other states, about 300 overdraft notices per year are expected. The majority of the overdrafts will probably result from bank error, deposits into incorrect accounts, or mathematical errors by attorneys. Such errors generally will not result in the opening of a discipline file. However, a few overdrafts as a result of incorrect handling of client funds, outright misappropriation, or failure to maintain trust account records required by Lawyers Board Opinion 9, will probably be found and will generate disciplinary files.

"Prompt and public disciplinary actions are taken against lawyers who mishandle monies."

The effectiveness of the new program will be limited. The program will not detect or prevent all large misappropriations. Some misappropriations occur outside the trust account or without NSF checks. When James O'Hagan misappropriated client funds, he did not overdraw the trust account. John Flanagan forged endorsements on third-party checks, outside of his trust account. Such thefts will not be detected by the new program.



The overdraft notification rule will catch some misappropriations, and will detect trust account mismanagement problems while they are minor and correctable. Education of attorneys, which has long been one function of the Director's Office, will be a major goal and benefit of the program. In addition to the brochure describing proper trust account management distributed in June 1989, the Director's Office has been providing advisory opinions on trust accounts and other subjects for many years. The Director's Office will continue to provide guidance to attorneys in handling of client funds and maintaining required books and records.

A.10

American Bar Association

Commission on Evaluation of Disciplinary Enforcement

Report to the House of Delegates

Recommendations

1 Be it resolved, that the American Bar Association adopts the following
2 recommendations:

3 Recommendation 1: Regulation of the profession by the judiciary

4 Regulation of the legal profession should remain under the authority of the judicial
5 branch of government.

6 Recommendation 2: Supporting judicial regulation and professional
7 responsibility

8 2.1 The American Bar Association should continue to place the highest
9 priority on promoting, developing, and supporting judicial regulation of the legal
10 profession and professional responsibility.
11 2.2 The Association should continue to provide adequate funding and
12 staffing for activities to support judicial regulation and professional responsibility.
13 2.3 To promote the most efficient allocation of resources, the Association
14 should establish written policies to insure that all of its judicial regulation and
15 professional responsibility activities are coordinated, regardless of the Association
16 entity conducting the activity.

1 Recommendation 3: Expanding the scope of public protection

2 The Court should establish a system of regulation of the legal profession that
3 consists of:
4 3.1 component agencies, including but not limited to:
5 (a) lawyer discipline,
6 (b) a client protection fund,
7 (c) mandatory arbitration of fee disputes,
8 (d) voluntary arbitration of lawyer malpractice claims and other
9 disputes,
10 (e) mediation,
11 (f) lawyer practice assistance,
12 (g) lawyer substance abuse counseling; and
13 3.2 a central intake office for the receipt of all complaints about lawyers,
14 whose functions should include: (a) providing assistance to complainants in stating
15 their complaints; (b) making a preliminary determination as to the validity of the
16 complaint; (c) dismissing the complaint or determining the appropriate component
17 agency or agencies to which the complaint should be directed and forwarding the
18 complaint; (d) providing information to complainants about available remedies,
19 operations and procedures, and the status of their complaints; and (e) coordinating
20 among agencies and tracking the handling and disposition of each complaint.

21 Recommendation 4: Lawyer Practice Assistance Committee

22 4.1 The Court should establish a Lawyer Practice Assistance Committee.
23 At least one third of the members should be nonlawyers. The Lawyer Assistance
24 Committee should consider cases referred to it by the disciplinary counsel and the
25 Court and should assist lawyers voluntarily seeking assistance. The Committee
26 should provide guidance to the lawyer including, when appropriate: (a) review of the
27 lawyer's office and case management practices and recommendations for improve-
28 ment; and (b) review of the lawyer's substantive knowledge of the law and
29 recommendations for further study.
30 4.2 In cases in which the lawyer has agreed with disciplinary counsel to
31 submit to practice assistance, the Committee may require the lawyer to attend
32 continuing legal education classes, to attend and successfully complete law school
33 courses or office management courses, to participate in substance abuse recovery
34 programs or in psychological counseling, or to take other actions necessary to
35 improve the lawyer's fitness to practice law.

1 Recommendation 5: Independence of disciplinary officials

2 All jurisdictions should structure their lawyer disciplinary systems so that
3 disciplinary officials are appointed by the highest court of the jurisdiction or by
4 other disciplinary officials who are appointed by the Court. Disciplinary officials
5 should possess sufficient independent authority to conduct the lawyer discipline
6 function impartially:
7 5.1 Elected bar officials, their appointees and employees should provide
8 only administrative and other services for the disciplinary system that support the
9 operation of the system without impairing the independence of disciplinary officials.
10 5.2 Elected bar officials, their appointees and employees should have no
11 investigative, prosecutorial, or adjudicative functions in the disciplinary process.
12 5.3 The budget for the office of disciplinary counsel should be formulated
13 by disciplinary counsel. The budget for the statewide disciplinary board should be
14 formulated by the board. Disciplinary budgets should be approved or modified
15 directly by the Court or by an administrative agency of the Court. Disciplinary
16 counsel and the disciplinary board should be accountable for the expenditure of
17 funds only to the Court, except that bar associations may provide accounting and
18 other financial services that do not impair the independence of disciplinary officials.
19 5.4 Disciplinary counsel and staff, disciplinary adjudicators and staff, and
20 other disciplinary agency personnel should be absolutely immune from civil liability
21 for all actions performed within the scope of their duties, consistent with ABA
22 MRLDE 12A.

23 Recommendation 6: Independence of disciplinary counsel

24 6.1 The Court alone should appoint and for cause remove disciplinary
25 counsel and should provide sufficient authority for prosecutorial independence and
26 discretion. The Court should also promulgate rules providing that disciplinary
27 counsel shall:
28 (a) have authority to employ and terminate staff, formulate a budget
29 and approve expenditures subject only to the authority of the Court;
30 (b) have authority to determine after investigation whether probable
31 cause exists to believe misconduct has been committed and to dismiss a case
32 or file formal charges against respondent lawyers;
33 (c) have authority, in cases involving allegations of minor incompe-
34 tence, neglect, or misconduct, to resolve a matter with the consent of the
35 respondent by administrative procedures established by the Court;
36 (d) have authority to appeal a decision of a hearing committee or the
37 disciplinary board;

1 (e) be compensated sufficiently to attract competent counsel and retain
2 experienced counsel; and
3 (f) be prohibited from providing advisory ethics opinions, either orally
4 or in writing.
5 6.2 The Court should adopt a rule providing that no disciplinary
6 adjudicative official (including hearing committee members, disciplinary board
7 members, or members of the Court) shall communicate ex parte with disciplinary
8 counsel regarding an ongoing investigation or disciplinary matter, except about
9 administrative matters or to report information alleging the misconduct of a lawyer.

10 Recommendation 7: Fully public discipline process

11 All records of the lawyer disciplinary agency except the work product of
12 disciplinary counsel should be available to the public from the time of the
13 complainant's initial communication with the agency, unless the complainant or
14 respondent, upon a showing of grounds that would be sufficient in a civil proceeding,
15 obtains a protective order for specific documents or records. All proceedings except
16 adjudicative deliberations should be public.

17 Recommendation 8: Complainant immunity

18 8.1 Complainants should be absolutely immune from civil suit for all
19 communications with the disciplinary agency and for all statements made within the
20 disciplinary proceeding. Consideration should be given to making it a misdemeanor
21 to knowingly file a false complaint with the disciplinary agency.
22 8.2 When informing the public about the existence and operations of the
23 disciplinary agency the agency should emphasize and explain the nature of a
24 complainant's absolute immunity.

25 Recommendation 9: Complainant's rights

26 9.1 Complainants should receive notice of the status of disciplinary
27 proceedings at all stages of the proceedings. In general, a complainant should
28 receive, contemporaneously, the same notices and orders the respondent receives as
29 well as copies of respondent's communications to the agency, except information that
30 is subject to another client's privilege.
31 9.2 Complainants should be permitted a reasonable opportunity to rebut
32 statements of the respondent before a complaint is summarily dismissed.

1 9.3 Complainants should be notified in writing when the complaint has
2 been dismissed. The notice should include a concise recitation of the specific facts
3 and reasoning upon which the decision to dismiss was made.
4 9.4 Disciplinary counsel should issue written guidelines for determining
5 which cases will be dismissed for failure to allege facts that, if true, would constitute
6 grounds for disciplinary action. These guidelines should be sent to complainants
7 whose cases are dismissed.
8 9.5 Complainants should be notified of the date, time, and location of the
9 hearing. Complainants should have the right to personally appear and testify at the
10 hearing.
11 9.6 All jurisdictions should afford a right of review to complainants whose
12 complaints are dismissed prior to a full hearing on the merits, consistent with ABA
13 MRLDE 11B(3) and 31.

14 Recommendation 10: Procedures in lieu of discipline for minor
15 misconduct

16 All jurisdictions should adopt procedures in lieu of discipline for matters in
17 which a lawyer's actions constitute minor misconduct, minor incompetence, or minor
18 neglect. The procedures should provide:
19 10.1 The Court shall define criteria for matters involving minor misconduct,
20 minor incompetence, or minor neglect that may be resolved by non-disciplinary
21 proceedings or dismissal.
22 10.2 If disciplinary counsel determines that a matter meets the criteria
23 established by the Court, disciplinary counsel may reach agreement with the
24 respondent to submit the matter to non-disciplinary proceedings. Such proceedings
25 may consist of fee arbitration, arbitration, mediation, lawyer practice assistance,
26 substance abuse recovery programs, psychological counseling, or any other non-disci-
27 plinary proceedings authorized by the Court. Disciplinary counsel shall then refer
28 the matter to the agency or agencies authorized by the Court to conduct the
29 proceedings.
30 10.3 If the lawyer does not comply with the terms of the agreement,
31 disciplinary counsel may resume disciplinary proceedings.
32 10.4 If the lawyer fulfills the terms of the agreement, the disciplinary
33 counsel shall dismiss the disciplinary proceeding.

34 Recommendation 11: Expedited procedures for minor misconduct

35 All jurisdictions should adopt simplified, expedited procedures to adjudicate
36 cases in which the alleged misconduct warrants less than suspension or disbarment

1 or other restriction on the right to practice. Expedited procedures should provide:

2 11.1 The Court shall define minor violations of the rules of professional
3 conduct that shall subject the respondent to sanctions not constituting restrictions
4 on the right to practice law, consistent with the ABA Standards for Imposing Lawyer
5 Sanctions.
6 11.2 Disciplinary counsel shall determine upon investigation whether
7 probable cause exists to file charges alleging a minor violation of the rules of
8 professional conduct and, if so, shall file charges with the Court.
9 11.3 A hearing shall be held by a single adjudicator [member of a hearing
10 committee].
11 11.4 The adjudicator shall make concise, written findings of fact and
12 conclusions of law and shall either dismiss the case or impose a sanction that does
13 not constitute a restriction on the respondent's right to practice.
14 11.5 Respondent and Disciplinary counsel shall have the right to appeal the
15 decision to a second adjudicator [member of the statewide disciplinary board], who
16 shall either adopt the decision below or make written findings. The appellate
17 adjudicator shall either dismiss the case or impose a sanction that does not
18 constitute a restriction on the respondent's right to practice.
19 11.6 The decision of the appellate adjudicator may be reviewed at the
20 discretion of the Court upon application by respondent or Disciplinary counsel. The
21 Court shall grant review only in cases involving significant issues of law or upon a
22 showing that the decision below constituted an abuse of discretion. The Court shall
23 either adopt the decision below or make written findings. The Court shall either
24 dismiss the case or impose a sanction that does not constitute a restriction on the
25 respondent's right to practice.
26 11.7 Upon final disposition of the case, the written findings of the final
27 adjudicator shall be published in an appropriate journal or reporter and a copy
28 shall be mailed to the respondent and the complainant and to the ABA National
29 Discipline Data Bank.

30 Recommendation 12: Disposition of cases by a hearing committee, the
31 Board, or Court

32 The statewide disciplinary board should not review a determination of the
33 hearing committee except upon a request for review by the disciplinary counsel or
34 respondent or upon the vote of a majority of the Board. The Court should not
35 review a matter except: (a) within its discretion upon a request for review of the
36 determination of the Board by the disciplinary counsel or respondent; or (b) upon
37 the vote of a majority of the Court to review a determination of the hearing
38 committee or Board. The Court should exercise its jurisdiction only in the capacity

1 of appellate review. In any matter finally determined by a hearing committee or the
2 Board, the Court should by per curiam order adopt the findings and conclusions
3 contained in the written report of the committee or Board.

4 Recommendation 13: Interim suspension for threat of harm

5 The immediate interim suspension of a lawyer should be ordered upon a
6 finding that a lawyer poses a substantial threat of serious harm to the public,
7 contrary to the provision of MRLDE 20A requiring a showing of "irreparable harm."

8 Recommendation 14: Funding and staffing

9 The Court should insure that adequate funding and staffing is provided for
10 the disciplinary agency so that: (a) disciplinary cases are screened, investigated,
11 prosecuted and adjudicated promptly; (b) the work load per staff person permits
12 careful and thorough performance of duties; (c) professional and support staff are
13 compensated at a level sufficient to attract and retain competent personnel; (d)
14 sufficient office and data processing equipment exist to efficiently and quickly
15 process the work load and manage the agency; (e) adequate office space exists to
16 provide a productive working environment; and (f) staff and volunteers are
17 adequately trained in disciplinary law and procedure.

18 Recommendation 15: Standards for resources

19 15.1 Each jurisdiction should keep case load and time statistics to assist
20 in determining the need for additional staff and resources. Case load and time
21 statistics should include, at the minimum:
22 (a) time records for all counsel and investigators, tracked by case or
23 other task including time spent on non-disciplinary functions;
24 (b) the number of pending cases at each stage in the disciplinary
25 process for each counsel and for the whole agency;
26 (c) the number of new cases assigned to each counsel during the year
27 and the total for the agency;
28 (d) the number of cases carried over from the prior year for each
29 counsel and the total for the agency;
30 (e) the number of cases closed by each counsel during the year and
31 the total for the agency;
32 (f) the number of cases of special difficulty or complexity at each
33 stage in the proceedings; and

1 (g) the ratio of staff turnover.
2 15.2 The American Bar Association, National Organization of Bar Counsel,
3 and disciplinary agencies in each jurisdiction should cooperate to develop standards
4 for: (a) staffing levels and case load per professional and support staff member; (b)
5 case processing time at all stages of disciplinary proceedings; and (c) compensation
6 of professional and support staff.

7 Recommendation 16: Field investigations

8 Disciplinary counsel should have sufficient staff and resources to: (1) fully
9 investigate complaints, by such means as sending investigators into the field to
10 interview witnesses and examine records and evidence; and (2) regularly monitor
11 sources of public information such as news reports and court decisions likely to
12 contain information about lawyer misconduct.

13 Recommendation 17: Random audit of trust accounts

14 The Court should adopt a rule providing that disciplinary counsel may audit
15 lawyer trust accounts selected at random without having grounds to believe
16 misconduct has occurred.

17 Recommendation 18: Burden of proof in fee disputes

18 The court should adopt a rule to provide that where there is no written
19 agreement between the lawyer and the client, the lawyer shall bear the burden of
20 proof of all facts, including the competency of the work and the absence of neglect
21 or delay, and the lawyer shall be entitled to no more than the reasonable value of
22 services for the work completed or, if the failure to complete the work was caused
23 by the client, for the work performed.

24 Recommendation 19: Mandatory malpractice insurance study

25 The American Bar Association should continue studies to determine whether
26 a model program and model rule should be created to: (a) make appropriate levels
27 of malpractice insurance coverage available at a reasonable price; and (b) make
28 coverage mandatory for all lawyers who have clients.

1 Recommendation 20: Effective date of disbarment and suspension
2 orders

3 The Court should adopt a rule providing that orders of disbarment and
4 suspension shall be effective on a date [15] days after the date of the order except
5 where the Court finds that immediate disbarment or suspension is necessary to
6 protect the public, contrary to the provisions of MRLDE 27E.

7 Recommendation 21: National Discipline Data Bank

8 The American Bar Association should provide or seek adequate funding to
9 automate the dissemination of reciprocal discipline information by means of
10 electronic data processing and telecommunications, so that:
11 21.1 appropriate discipline, bar admissions, and other officials in each
12 jurisdiction can directly access and query the National Discipline Data Bank via a
13 computer telecommunications network;
14 21.2 a uniform data format and software are developed permitting
15 automated cross-checking of jurisdictions' rosters of licensed lawyers against the
16 National Discipline Data Bank's contents;
17 21.3 a listing of the contents of the National Discipline Data Bank is
18 disseminated to discipline officials quarterly or semi-annually on an electronic data
19 processing medium suitable for automated comparison with a jurisdiction's roster
20 of lawyers.

21 Recommendation 22: Coordinating interstate identification

22 22.1 The American Bar Association and the appropriate officials in each
23 jurisdiction should establish a system of assigning a universal identification number
24 to each lawyer licensed to practice law.
25 22.2 The highest court in each jurisdiction should require all lawyers
26 licensed in the jurisdiction to (a) register annually with the agency designated by the
27 Court stating all other jurisdictions in which they are licensed to practice law, and
28 (b) immediately report to the agency designated by the Court changes of law license
29 status in other jurisdictions such as admission to practice, discipline imposed, or
30 resignation.