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ANNUAL REPORT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

ANNUAL REPORT OF THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY

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I. INTRODUCTION AND HIGHLIGHTS

The Lawyers Board and Director are required to report anually on the operation of the professional responsibility system. *See* Rules 4(c) and 5(b), Rules on Lawyers Professional Responsibility. The Reports are hereby jointly made for the period June 1, 1996, through May 31, 1997.

Leadership Changes.

A report on the result of leadership changes will no doubt highlight next year's annual report. It also must lead off this year's as well, since it has already impacted the Director's Office. Marcia Johnson resigned as Director effective April 2, 1997. Ms. Johnson served four and one-half years as Director, and is now employed at the Attorney General's Office. Martin Cole was named Acting Director on April 2, 1997, and remains in that position at the time of filing this report.

The Supreme Court appointed a Search Committee to recommend a new Director. Several Lawyers Board members served on the Committee. Two finalists were recommended to the Court, which announced on May 20, 1997, that St. Paul attorney Edward Cleary will become the next Director of the Office of Lawyers Professional Responsibility by August 1, 1997 (pp. 25-26).

Board Chair Greg Bistram is now in his final year as Chair and a new Chair will be appointed by the Court by February 1, 1998. Several other Board members' terms expired this year; Nancy W. McLean served as Board Vice-chair; Charles Lundberg served on the Executive Committee and was Chair of the Board's formal Opinion Committee; Kathleen Sheran, a public member, served on the Executive Committee and Richard Abram, public member, served on panels. New Board members appointed to fill these vacancies are public members Douglas Faragher from Duluth and Michael E. Mickelson from

Willmar. New attorney members include E. George Widseth, and MSBA nominee Timothy O'Brien, both from Minneapolis. The Executive Committee now consists of Board Chair Gregory Bistram, Vice-Chair Kent A. Gernander, Thomas D. Feinberg and public members Genevieve Ubel and Janet Johnson. A complete Board listing is at p. 27.

New Board Opinion on Secret Recording.

In September 1996 the Lawyers Board adopted Opinion No. 18 concerning secret recordings of conversations. The opinion prohibits, with certain exceptions, lawyers from recording conversations without the knowledge of all parties to the conversation. The scope of the opinion is limited to conduct which occurs in connection with the lawyer's professional activities and exempts lawyers engaged in the prosecution or defense of a criminal matter. The opinion is somewhat unique in that it is the first Lawyers Board opinion to include a committee comment explaining the rationale and authority for the opinion. The full text of the opinion and the *Bench and Bar* article announcing its adoption are included in this report at pp. 28-34.

Trust Account CLE Seminar.

The Director's Office presented its first CLE seminar concerning trust accounts in November 1996. The seminar entitled "Trust Accounts: Problems, Issues and Solutions" was created by Ken Jorgensen, First Assistant Director and Karen Welle, legal assistant. Other presenters at the seminar were Martin Cole concerning the Minnesota Client Security Board and Lynda Nelson, legal assistant, who spoke about the Trust Account Overdraft Notification Program. The seminar included a number of trust account related issues including what constitutes client funds, which type of trust account should be used, trust account signatories, advance fee payments, attorneys' liens and fee disputes concerning client trust funds. The seminar also included a computer

demonstration on how to maintain lawyer trust accounts using *Quicken*®. The outline is attached at pp. 35-37.

The seminar was well attended and the Director's Office intends to provide similar seminars in the future.

Update on Child Support Suspension Rule.

Last year's annual report discussed proposed Rule 30, Rules on Lawyers Professional Responsibility, which provides for the administrative suspension of attorneys who fail to pay child support or maintenance pursuant to Minn. Stat. § 518.551(12). In June 1996 the Supreme Court approved Rule 30 providing for administrative suspension of lawyers upon receiving statutorily required reports from child support enforcement authorities. The text of Rule 30 and the *Bench & Bar* article announcing adoption and application of the Rule are included in this report at pp. 38-42. As of June 1, 1997, the Director's Office has yet to receive any referrals from the Court or child support enforcement authorities pursuant to Rule 30 and Minn. Stat. § 518.551(12).

II. CASELOAD AND STATISTICS

A. Statistics.

TABLE I

Supreme Court Dispositions and Reinstatements 1985-1996

Number of Lawyers

	Disbar.	Susp.	Probation	Censure & Reprimand	Dismissal	Reinstated	Disability	Reinstate Denied	Other*	Total
1985	4	16	14	10	3	1	1	2	0	51
1986	8	17	4	2	0	2	0	0	0	33
1987	5	18	7	4	0	3	1	1	0	39
1988	4	22	8	4	1	4	3	0	0	46
1989	5	19	8	4	2	1	1	0	0	40
1990	8	27	9	10	0	2	2	2	0	60
1991	8	14	10	6	2	3	3	2	1*	49
1992	7	16	8	5	0	3	2	0	0	41
1993	5	15	12	3	1	9	1	2	0	48
1994	8	5	7	0	0	4	1	0	0	25
1995	6	26	9	4	1	5	4	0	4*	59
1996	4	27	5	0	3	4	2	1	2**	48

*Supreme Court admonition affirmed.
**1 Supreme Court admonition affirmed.
1 Supreme Court admonition reversed.

TABLE II

	Lawyers Board Goal	12/93	12/94	12/95	12/96	5/31/97
Total Open Files	500	548	586	608	558	532
Cases at Least One Year Old	100	76	108	140	115	120
Complaints Received YTD		1,405	1,456	1,290	1,438	559
Files Closed YTD		1,364	1,418	1,268	1,488	585

TABLE III

	Percentage of Files Closed					
	1991	1992	1993	1994	1995	1996
1. Total Dismissals	78%	80%	78%	81%	78%	78%
a. Summary Dismissals	40%	39%	40%	40%	38%	39%
b. DNW/DEC	32%	37%	31%	36%	36%	32%
c. DNW/DIR	7%	4%	6%	5%	4%	6%
2. Admonitions	12%	10%	11%	10%	8%	10%
3. Private Probation	1%	2%	2%	2%	3%	1%
4. Supreme Court Dispositions	6%	6%	6%	5%	8%	6%
a. Supreme Court Dismissal	--	--	--	--	-	-
b. Supreme Court Reprimand	1%	1%	--	--	-	-
c. Supreme Court Probation	1%	1%	1%	1%	1%	1%
d. Supreme Court Suspension	3%	3%	3%	1%	4%	4%
e. Supreme Court Disbarment	1%	1%	2%	3%	2%	1%

TABLE IV

Number of Months File Was Open at Disposition

	1991	1992	1993	1994	1995	1996
Discipline Not Warranted/ District Ethics Committee	4	4	4	4	5	5
Discipline Not Warranted/ Director	6	8	8	8	7	7
Admonition	8	7	9	10	10	9
Private Probation	8	12	12	13	14	17
Supreme Court Reprimand	14	22	19	--	31	--
Supreme Court Probation	11	18	15	22	20	13
Supreme Court Suspension	13	14	16	17	20	20
Supreme Court Disbarment	16	14	24	14	14	17

B. Minnesota Supreme Court Disciplinary Cases.

Attached at pp. 43-44 is a table identifying the attorneys who were publicly disciplined or reinstated to the practice of law after suspension or disbarment in calendar year 1996. Four attorneys were disbarred in 1996 and two attorneys were disbarred during the first six months of 1997. Those disbarred were:

Daniel A. Davis (1/9/96)

Warren E. Strom (7/18/96)

Neil D. Heikkila (10/7/96)

John W. Ploetz (12/20/96)

Reynaud L. Harp (3/27/97)

Michael H. Randall (5/8/97)

The public disciplinary cases decided in 1996 and during the first six months of 1997 which hold particular significance for the bar are:

John W. Ploetz of Burnsville was disbarred after admitting to misappropriation of over $450,000 while performing real estate closings.

Reynaud L. Harp of St. Paul was disbarred after abandoning clients and then his entire law practice. Harp had previously been disciplined in 1984 for failure to file income tax returns.

Wynette Head and Damon L. Ward were both suspended from the practice of law for conduct relating to Head improperly receiving public benefits and then testifying falsely in a civil proceeding relating to her improper receipt of these benefits. Head also pled guilty to criminal charges. Ward's suspension resulted from his first representing Head in the civil proceeding and then testifying falsely on Head's behalf in the civil proceeding concerning payments he had made to Head.

Gary A. Fridell, the Goodhue County Attorney, was publicly reprimanded and agreed to resign as County Attorney after admitting he engaged in a sexual relationship with an employee within the County Attorney's Office.

Alfred M. Stanbury was publicly reprimanded for failing to pay law office creditors who had obtained judgments against him. Stanbury was then suspended for 30 days for issuing a stop-payment order on his court filing fee check due to his belief that the court had not provided him with the process to which he was entitled. In both instances, the court rejected Stanbury's arguments that he possessed a "good faith belief" that he had no *valid* obligation to pay the amounts due.

III. DIRECTOR'S OFFICE.

A. Budget.

1. FY'97 Budget.

Projected actual expenditures for the fiscal year ending June 30, 1997, are estimated to be $1,930,116. The FY'97 budget included $258,338 for data processing to complete the new computer system which is discussed below.

2. FY'98 Budget.

On July 1, 1996, the attorney registration fee was increased to $157/$71 which resulted in a $10/$4 increase to the Lawyers Professional Responsibility Board. The increase was less than requested, however, expenditures have decreased since the petition was filed in February of 1996. The rental rate for the Judicial Center decreased for FY'98 and the indirect costs which were included in the budget forecast for the fee increase were eliminated. These two line items resulted in a significant budget savings over several years.

The FY'98 budget includes expenditures in the amount of $1,809,070. The budget includes a projected 3 percent cost of living adjustment and a 3 percent performance increase. The FY'98 budget does not include additional personnel.

B. Administration.

Computerization.

For the past two years the Director's Office has been working with the Macro Group to design and develop a new computer data record keeping system for lawyer

discipline records. In May 1996, Macro Group employees began working onsite in the Director's Office developing the new system to track complaints and record attorney discipline. The Macro employees and the Director's Office have spent numerous hours working with the consultants in developing screens and reports. Information from the prior TCIS system is now being converted and the new system (Attorney Discipline Record System (ADRS)) is scheduled to be implemented in July 1997. ADRS will provide for the maintenance of statistics which were unavailable on the TCIS system.

C. **Personnel.**

Attached at p. 45 is the current Director's Office organizational chart. The Office had few personnel changes this year. In December 1996, Marcia A. Johnson submitted her resignation as Director after serving over 4 years. A search committee was formed and in May 1997, Edward J. Cleary was appointed by the Supreme Court as the new Director of Lawyers Professional Responsibility. Mr. Cleary will join the Director's Office by August 1, 1997.

In February 1997, law clerk Audra Engebretson accepted a clerk position in Washington County. Pamela Erickson, a second year law student was hired and began employment in March.

D. **Probation.**

During 1996-97 there were 105 attorneys on probation during some portion of the year; 43 were public probations, the remaining 62 were private stipulations. About 60 percent of these probations were supervised by volunteer attorneys. Supervisors generally practice in the same geographic area, have some familiarity with the probationer's type of practice but do not frequently have cases adverse to that attorney. Supervisors are usually nominated by the attorney they monitor but must be approved by the Director's Office.

Seventeen (17) probation files opened during 1996 included neglect and non-communication. These probations are almost always supervised and generally require

the probationer to submit a written plan outlining office procedures he/she has initiated to improve office practice and file management.

Sixteen (16) probation files opened in 1996 involved inadequate trust account books and records. As in 1995, the Director's Office has taken an active role in monitoring the books and records of attorneys on probation. Previously, the primary role of monitoring trust account recordkeeping had been delegated to a volunteer supervisor, with less frequent review by the Director. Increasingly, the Director's Office found that volunteer supervisors were not in a position to conduct a thorough review of the probationer's books and records and did not have the time or expertise to assist the probationer in bringing his or her records and practices into conformance with the rules and LPRB opinions. For these reasons, a system was implemented in which each attorney on a probation for books and records violations is now required in the initial year of the probation to submit complete books and records to the Director on a quarterly basis. These records are then audited by the legal assistants in the Director's Office and any deficiencies are pointed out and corrected. The legal assistant staff has also assisted a number of attorneys in converting their manual records to a computerized system. This has been especially helpful for solo or small firm practitioners. If a probationer has been successful, the Director's Office decreases the number of record reviews. If an attorney is still unable to keep books and records accurately, the Director's Office meets personally with the attorney for individual coaching. This system, while placing additional demands on the Director's Office, has proven to be quite successful in educating those on probation so that future problems do not arise. In fact, several probationers, upon termination of the probation, have commented that while they were initially dreading the process, they found it to be extremely helpful.

In 1995, five probations were opened requiring therapy or psychological counseling. In 1996 only two new probations of this kind were opened. The Director's

Office monitors compliance with the treatment requirements of probation and usually receives quarterly reports from the mental health professional. These probations are almost evenly divided between public and private probations. All but two of them involved client misconduct, usually neglect. In 1995, one probation was opened involving chemical dependency. In 1996, there were three such probations.

1. File Totals:

Total Probation files as of 1/1/96	77	
Probation files opened in 1996		30
Probation files closed in 1996		40
Total probation files as of 1/1/97	67	

2. Attorneys placed on probation in 1996: 105

Court-ordered probations (7 of which were for attorneys reinstated after suspension from practice)	12
Supervised (6 after suspension)	10
Unsupervised (1 after suspension)	2
Stipulated private probations	17
Supervised	7
Unsupervised	10

3. Files opened in 1996 involving:*

Client-Related Violations	21
Non-Client-Related Violations	14

4. Areas of Misconduct of attorneys placed on probation in 1996:*

Neglect/Non-commun.	15	Conflict of Interest	1
Taxes	3	Criminal Conduct	7
Books and Records	12	Unauthorized Practice	1
Misrepresentation	6	Illegal fees	1
Non-cooperation	4		
Misappropriation	0		

3 files involved chemical dependency (abuse of alcohol/drugs);
2 files involved psychological disorder

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

5. Files closed in 1996: 40

Completed probations	38
Revoked probations	2
(Extended probations	1)

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

Attorney 1	6
Attorney 2	9
Legal Assistant	15

E. Advisory Opinions.

Telephone advisory opinions concerning questions of professional responsibility were again a significant and substantial function performed by the Director's Office. The number of telephone opinions issued to lawyers and judges has increased over the past several years but remained fairly constant from 1995 to 1996:

1989	948
1990	1130
1991	1083
1992	1201
1993	1410
1994	1489
1995	1567
1996	1568

Advisory opinions issued by the Director's Office are the personal opinion of the attorneys issuing the opinions and are not binding upon the Lawyers Board or the Supreme Court. In 1996, the Director's Office expended 411.25 hours of attorney time in issuing advisory opinions. This compares with 391.5 hours in 1995. The most frequent area of inquiry in 1996 was again conflict of interest.

F. Judgments and Collections

Cost judgments entered by the Minnesota Supreme Court in 1996 decreased by about $14,500 from the amount of judgments entered in 1995. The dollar amount of these judgments entered in 1996 was approximately one-third less than the amount

entered in 1995. Judgments were entered against 29 attorneys in 1996, while judgments were entered against 46 attorneys in 1995. Despite the decrease in the number and the dollar amount of judgments entered in 1996, the Director collected approximately $3,500 more in 1996 than in 1995. Approximately 56% of the amount of judgments entered in 1996 have been collected to date.

1.	Cost Judgments Entered in 1996	$ 26,585.51
2.	Total Costs Collected in 1996	24,916.07
3.	Total Costs Paid in 1996	2,507.05
4.	Costs Collected in 1996 for Dispositions prior to 1996, including interest (19 attorneys)	11,611.72
5.	Cost Judgments Entered in 1997	11,925.73
6.	Costs Collected in 1997	10,399.76
7.	Costs Collected in 1997 for Judgments Entered in 1996	4,713.00
8.	Unpaid Judgments as of January 1, 1997	144,451.62
9.	1996 National Discipline Data Bank Reports	57

G. **Professional Corporations.**

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

The Director's Office has monitored the reporting requirements of the statute since 1973. Annual reports are sought from all known legal professional corporations which includes professional limited liability corporations and professional limited liability partnerships. Although the statutory authority exists to revoke the corporate charter of professional corporations which fail to comply with the reporting

requirements, no revocation proceedings have been pursued. The following are the income statistics for the professional corporation department as of May 15, 1997:

926	@	$25.00	$23,150.00
106	@	100.00	10,600.00
			33,750.00
19	for	3,525.05*	3,525.05
			37,275.05

*Funds collected for fees owed for 1995 and prior years.

Total Attorney Hours:	15
Total Non-attorney Hours:	201

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

The number of filings and, correspondingly, the filing fees received are up this year. Filings increased by 12 percent and fees by 26 percent. This increase is due, in large part, to the publication of a *Bench & Bar* article detailing the professional corporations filing requirements.

The legislature has enacted amendments to the Minnesota Professional Corporations Act which will result in the eventual replacement, in 1999, of the Professional Corporations Act with the Minnesota Professional Firms Act (Minn. Stat. § 319B.01 to 319B.12). It is not anticipated that the new Act will substantially change the reporting and filing requirements.

H. Overdraft Notification.

Since 1990, banks have reported overdrafts on lawyer trust accounts to the Director's Office. The number of overdraft reports decreased from 142 in 1995 to 126 in 1996.

1. Terminated Inquiries.

During 1996, the Director's Office received 126 overdraft notices (ODN's) and terminated 110 overdraft inquiries without initiating a disciplinary investigation. In 39 of the terminated overdrafts, changes or improvements were recommended in the form of an instructional letter. The *Quicken*® brochure continues to be used frequently in conjunction with instruction letters where the attorney(s) is maintaining computerized trust account books and records. The trust account brochure entitled "Attorney Business and Trust Accounts: Books and Records Requirements and Sample Trust Account Transactions, Trial Balances and Reconciliations" similarly continues to be used in the Overdraft Notification Program for educational purposes. Statistics for 1996 terminated inquiries and instruction letters are set forth below:

1. Overdraft Causes.

Bank error	24
Service or check charges	24
Late deposit	18
Mathematical/clerical error	13
Improper/lacking endorsements	10
Deposit to wrong account	6
Third party check bounced	10
Reporting error	2
Check written in error on TA	1
Other	2

2. Disciplinary File Openings.

Disciplinary investigations are commenced where the attorney's response does not adequately explain the overdraft or significant problems are identified by reviewing the records submitted. Statistics for 1996 trust account inquiries which resulted in disciplinary file openings are set forth below:

Reason for Investigation	
Shortages	2
Response fails to explain OD	5
Inadequate books and records	1
Suspected check kiting	1
Disciplinary file already open on prior OD	1
Repeated OD's	1
Total	**11**

The following 1996 public discipline cases involved trust account overdraft notices received by the Director's Office in 1996 and/or previous years:

In re Haugen, 543 N.W.2d 372

In re Hopkins, 555 N.W.2d 276

In re Ploetz, 556 N.W.2d 916

In re Sheffey, 542 N.W.2d 16

In re Singer, 541 N.W.2d 313

3. Time Requirements.

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

	1/95-12/95	1/96-12/96
Attorney	157.25 hrs	140.00 hrs
Legal assistant and other staff	236.00 hrs	218.00 hrs
Total	**393.25 hrs**	**358.00 hrs**

I. Complainant Appeals.

Under Rule 8(e), Rules on Lawyers Professional Responsibility, a complainant has the right to appeal from the Director's disposition in most cases. The file is then reviewed by a Board member. During 1996, the Director's Office received 261 complainant appeals, compared to 253 such appeals in 1995. This is approximately 20 percent of files closed. Board members made the following determinations:

		%
Approve Director's disposition	222	85
Direct further investigation	11	4

Instruct Director to issue an Admonition	0	0
Instruct Director to issue charges	1	1
Decisions Pending	27	10

A total of 43.75 clerical hours were spent in 1996 processing the appeal files, as well as an unrecorded amount of attorney time.

J. **Disclosure.**

1. Department Function.

The disclosure department responds to written requests for attorney disciplinary records. Public discipline is always disclosed. Private discipline is disclosed only with a properly executed consent from the affected attorney. In addition, the Director's Office responds to telephone requests for attorney public discipline records. The telephone requests and responses are not tabulated.

2. Source and Number of Written Requests for Disclosure. Calendar Year 1996.

	# of Requests	# of Attorneys	Discipline Imposed	Open Files
A. National Conference of Bar Examiners	137	137	6	0
B. Individual Attorneys	6	6	1	0
C. Local Referral Services				
1. MSBA	36	211	2	0
2. RCBA	18	124	3	0
D. Governor's Office	9	29	2	1
E. Other State Discipline Counsels/State Bars or Federal Jurisdiction	212	217	10	1
F. F.B.I.	12	12	0	0
G. MSBA: Specialist Certification Program	29	144	14	7
H. Miscellaneous Requests	14	58	5	1
TOTAL	473	938	43	10
(1995 Totals)	(419)	(1,140)	(59)	(6)

K. **Mediation Pilot Project.**

On July 1, 1995, pursuant to Rule 6X, Rules on Lawyers Professional Responsibility, the Director's Office instituted a pilot mediation program in the Third, Fourth and Twelfth Bar Association districts. Internal office procedures were adopted to establish standards for complaints that will be referred to mediation and for tracking the progress and resolution of those matters. Volunteers were recruited from the mediators registered with the State Court Administrator's office and a training seminar was held.

From July 1, 1995, through May 15, 1997, a total of 92 matters have been referred to mediation. Eight matters in the Third District Ethics Committee, 83 matters in the Fourth District Ethics Committee and one matter in the Twelfth District Ethics Committee. Eighty five (85) of the 92 matters referred to mediation have been returned to this Office. Thirty five (35) of the 85 matters returned have resulted in mediated agreements and dismissal of the complaint. Fifty (50) of the 85 matters returned did not result in mediated agreements. In 12 of those 50 matters, a mediation meeting was held but no agreement was reached; in 26 the complainant declined to participate in the mediation process; 10 were resolved prior to mediation; one matter was returned by the mediator because the best interests of the public would not have been served by mediation; and, one matter was withdrawn from mediation by the Director.

Forty-eight of the matters that were returned with no mediated agreement were ultimately dismissed. Forty-one were summarily dismissed without investigation and seven were dismissed after investigation by a district ethics committee. Two matters returned without a mediated agreement remain under investigation at the DEC.

In addition to the direct referrals to mediation noted above, 34 matters were referred to a DEC with instruction to investigate with the option to mediate if appropriate, pursuant to Rule 6X(b)(4). To date, two of these matters have been mediated, both resulting in a mediated agreement and dismissal, and nine remain

pending. The balance of these matters were handled as disciplinary investigations by the DEC. Two of these matters ultimately resulted in an admonition issued to the respondent and 21 were dismissed on the recommendation of the DEC.

The Director's Office continues to monitor the progress of the mediation program and make changes as appropriate. The number of matters sent to mediation appears to be in accord with what was anticipated by the Henson-Dolan Committee which recommended the pilot project. A report to the Court on the pilot project is due July 1, 1997.

L. Mandatory Fee Arbitration Pilot Project.

On December 12, 1994, in response to the petition of the Minnesota State Bar Association, the Court issued an order establishing a two-year pilot mandatory fee arbitration program. Three district bar associations were chosen to become sites for the pilot program -- Ramsey County (second district), a large metropolitan district; Blue Earth and Watanwan counties (sixth district), a medium size non-metro district; and Kittson, Mahnomen, Marshall, Norman, Pennington, Polk, Red Lake and Roseau counties (fourteenth district), a small greater Minnesota district. The Rules on Lawyers Professional Responsibility were amended to add Rule 6Y which provides:

> RULE 6Y. PILOT MANDATORY ARBITRATION PROGRAM FOR ATTORNEY-CLIENT FEE DISPUTES INVOLVING LAWYERS IN THE SECOND, SIXTH AND FOURTEENTH BAR ASSOCIATION DISTRICTS
>
> (a) Scope of the Program. This rule shall apply from July 1, 1995, through July 1, 1997, to any fee dispute between a client and a lawyer whose principal office is located in Blue Earth, Kittson, Mahnomen, Marshall, Norman, Pennington, Polk, Ramsey, Red Lake, Roseau or Watanwan county.
>
> (b) District Fee Arbitration. If a complaint involves a fee dispute subject to this rule, the Director shall advise the complainant and the respondent of the availability of fee arbitration and may refer the fee dispute to a participating district fee arbitration committee in the district where the lawyer maintains an office. Upon receipt of a referral from the Director or upon the request of a client or a lawyer located in that district

the district fee arbitration committee shall contact the client and determine if the client consents to arbitration of the dispute. If the client consents to arbitration of a fee dispute involving a lawyer who maintains an office in the district, the dispute shall be heard by the participating district fee arbitration committee and its results shall be binding. If the amount of the fee claims by the lawyer is greater than the jurisdictional limit of the conciliation courts under Minnesota Statutes Chapter 491A, then the lawyer may decline to arbitrate by notifying the committee in writing. Each district fee arbitration committee shall adopt rules of procedure to implement this rule.

(c) Report on the Pilot Program. No later than October 1, 1996, the Director shall report to the Court on the operation of the pilot program and shall make recommendations.

Absent further order of the Court, this pilot project will end July 1, 1997.

Jane Harens, Executive Director of the Ramsey County Bar Association, reports a generally positive experience with mandatory fee arbitration. Unlike the other two pilot districts, the second district experienced a substantial increase in the number of requests for fee arbitration during the first year of the pilot. Between July 1995 and July 1996, the second district received 101 requests for fee arbitration petitions. About one-third (31) were returned. This was double the number of petitions received in previous years. In the second year of the pilot (July 1996 to date), the number of petitions requested is down slightly (about 10%) and the percentage of petitions returned much lower (21%). Referrals to fee arbitration from the Director's Office constituted only 24 percent of the petitions received. The increased demand for fee arbitration during the pilot project taxed both the staff and volunteer resources of the second district bar association. As a result, the average time to complete fee arbitrations during the pilot program was 6.4 months.

The second district acted on eleven petitions during each year of the pilot. Two of the 22 petitions were dismissed for lack of jurisdiction. In 10 cases, fees were reduced by amounts ranging from 8 percent to 100 percent. In the remaining 10 cases, the entire fee was upheld. The amount in dispute ranged widely. Seven arbitrations involved amounts of $1,000 or less; three involved $1,001-2,500; six involved $2,501-5,000; and

four involved $5,001 - 7,500. About 60 percent of fee petitions returned came from family law cases.

In January 1997, the second district began charging a $25 filing fee to help offset the direct cost of the program and to reduce the relatively small number of client petitions which consume a disproportionate amount of staff and volunteer time. Other jurisdictions with mandatory fee arbitration indicate that imposing or increasing a fee arbitration filing fee eliminates most problem clients. The demands of processing these arbitrations did not leave resources for a formal evaluation of attorney and/or client evaluation of the process.

The change from voluntary to mandatory fee arbitration had little impact on the sixth and fourteenth district bar associations. In the sixth district during the first year, there were two requests for fee arbitration petitions but neither client returned the petitions requesting arbitration. During the second year of the pilot, its chair, Charles Ingman, was killed in an auto accident. Three arbitrations were pending at the time of his death.

In the fourteenth district, the number of arbitration requests actually decreased. Between July 1995 and July 1996, there were only two requests for fee arbitration. In one case, the committee declined jurisdiction because the attorney practiced in Anoka County and in the other case, the parties resolved their dispute before a hearing could be scheduled. The fourteenth district has had a history of attorney cooperation with fee arbitration. In the five years before implementation of mandatory fee arbitration, only one attorney had refused to arbitrate.

One weakness of the pilot program has been the general lack of awareness by both attorneys and clients of its existence. All three fee arbitration chairs felt that attorneys and clients generally are not aware of the project. The second district officers, while generally supportive of the program, did not feel that their local district should continue to bear the cost of an extended pilot. If mandatory fee arbitration is to

continue, attorneys should be required to inform clients about the availability of mandatory fee arbitration 30 days before filing suit to collect fees.

IV. DISTRICT ETHICS COMMITTEES.

Minnesota is one of only a handful of jurisdictions that have succeeded in making effective use of the local district ethics committees (DECs) to investigate complaints of lawyer misconduct. The system in Minnesota continues to work well and result in uniform application of ethical standards because the 21 bar association committees have (1) uniform rules of procedure, pursuant to the Rules on Lawyers Professional Responsibility; (2) are directly supervised by the Director's Office; and (3) have a large enough jurisdiction for the most part that respondents are not routinely known personally by the investigators.

Initial peer review of complaints by practitioners in their own area is exceedingly valuable in reinforcing confidence in the system for lawyers. Input and participation by non-lawyer members instills confidence by the public that the system is not simply cronyism. The quantity and quality of the DEC investigative reports remains high, and the lawyer discipline system owes much to their hard work and effort.

While the volume of files referred to the DECs increased slightly in 1996, the overall monthly average of 185, fluctuating between a low of 172 and a high of 203, remains fairly consistent with prior years. The year-to-date average volume for 1997 through April 30 is 189. The average file age for pending matters in all DECs for April 1997 was 2.2 months, with the Hennepin DEC at 2.1 months and the Ramsey DEC at 1.6 months. For *completed* DEC investigations in April 1997, the overall average was 3.9 months, with the Hennepin DEC at 4.9 months and the Ramsey DEC at 3.6 months, up slightly from prior years. Since the computerized statistical data kept prior to 1994 reflected only the age of pending, not completed matters, however, there is no basis on which to conclude that investigations are taking significantly longer than in prior years.

From 1971 until 1976, DECs were given 90 days to complete their investigations. That time was shortened to 45 days pursuant to Rule 7 when the Rules on Lawyers Professional Responsibility took effect in 1976. Historical records reflect that the chairpersons of the DECs immediately and unanimously voted to request an extension of this 45-day time period. The Board disagreed. Approximately one year later, in October 1977, Board minutes reflect that "most district ethics committees in the state are not in compliance with the rule." It would appear that failure to comply with the 45-day time frame in Rule 7(c), RLPR, has been an issue for many years.

At the request of several DECs the Lawyers Board at its June 1996 Board meeting voted to petition the Minnesota Supreme Court to change Rule 7(c), RLPR, to increase the 45-day timeline for DEC investigations to 90 days. The purpose for this change was to more accurately reflect the actual time it takes to complete DEC investigations. The Board directed that this rule change be presented to the Court at such time as other changes to the Rules on Lawyers Professional Responsibility were being proposed. As of the date of this report, the recommendation for change of Rule 7(c), RLPR, has not been presented to the Court.

V. FY'98 GOALS AND OBJECTIVES.

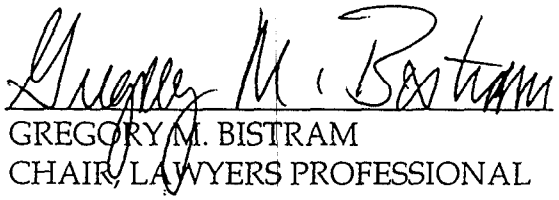
The goals for the Board and Director's Office largely will be determined by the new Director Mr. Cleary, and later by the new Board Chair. No major changes in direction should be anticipated.

New rules for Continuing Legal Education requiring three credits specifically in the area of professional responsibility and diversity will create even more pressure on the Director's Office to provide speakers. The Office has already produced one such new seminar itself, and the annual District Ethics Committee Seminar will be resumed next Spring. While trying to maintain its other obligations, the Director's Office will likely supply as many speakers as it can.

Caseload totals have improved slightly this past year, despite the Office being short one attorney for several months and otherwise disrupted by the search for a new Director.

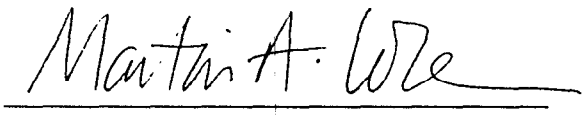
Dated: June 18, 1997.

Respectfully submitted,



GREGORY M. BISTRAM
CHAIR, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

and



MARTIN A. COLE
ACTING DIRECTOR OF THE OFFICE OF
LAWYERS PROFESSIONAL
RESPONSIBILITY

APPENDIX TO THE ANNUAL REPORT

THE SUPREME COURT OF MINNESOTA

Contact:

REBECCA J. FANNING, APR
COURT INFORMATION OFFICER
25 CONSTITUTION AVENUE
SAINT PAUL, MINNESOTA 55155
(612) 396-6043
FAX: (612) 297-5636

EDWARD CLEARY NAMED TO HEAD LAWYERS BOARDS

For Immediate Release

ST. PAUL, MN, May 20, 1997 - The Minnesota Supreme Court has hired Edward J. Cleary as director of the Minnesota Lawyers Professional Responsibility Board and the Client Security Board.

Cleary, who is a litigator in civil and criminal law, is the president-elect of the Ramsey County Bar Association and a former Assistant Ramsey County Public Defender. With more than 19 years of legal experience, Cleary has engaged in trial and appellate practice for the past 17 years. He has participated in attorney disciplinary case review from 1990 to 1993 while serving on the Ramsey County Ethics Committee.

"The Supreme Court is pleased to announce the hiring of Mr. Cleary for this incredibly important position that requires sensitivity to Minnesota's highest legal standards," said Chief Justice A.M. Keith. "These two boards serve an indispensable function as liaisons between the legal community and the citizenry, particularly when perceived or real difficulties arise in the delicate work of representing clients."

The Lawyers Professional Responsibility Board investigates complaints filed against Minnesota lawyers regarding disability or unprofessional conduct and recommends action to the Minnesota Supreme Court.

The Client Security Board investigates claims made by clients against attorneys arising from possible financial misconduct. The board also makes final determinations on payments from the Client Security fund to which all licensed attorneys contribute.

The director screens claims, coordinates investigations with the Lawyers Professional Responsibility Board and presents claims at board hearings.

Cleary, a resident of St. Paul, graduated from the University of Minnesota Law School in 1977. He graduated from the University of Minnesota with a B.A. in political science magna cum laude in 1974.

He is the author of *Beyond the Burning Cross - The First Amendment and the Landmark R.A.V. Case* which won the Eli M. Oboler Memorial Award in 1996 by the American Library Association for the best published work in the area of intellectual freedom in the nation for the years 1994-1995. Cleary was trial counsel and appellate lead counsel in R.A.V. v. St. Paul, a 1992 United States Supreme Court case that resulted in a landmark decision on the issue of free expression. He also co-authored the Ramsey County Bench Book in 1981 with Judge Kathleen Gearin.

Cleary, who will supervise a staff of 24, will begin as director by Aug. 1 at the board's office in the Minnesota Judicial Center at 25 Constitution Avenue in St. Paul.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Gregory M. Bistram, Chair
Kent A. Gernander, Vice-Chair
* Ann M. Bailly
John G. Brian, III
* John F. Edwards, II
* Douglas Faragher
** Thomas D. Feinberg
* James P. Hill
* Janet L. Johnson
* Kirk D. Kleckner
** William M. Kronschnabel
** Mr. John C. Lervick
* Sydney S. Martinneau
* Michael E. Mickelson
** Timothy M. O'Brien
Steven J. Olson
Nicholas Ostapenko
** Frederick Ramos
** Sharon L. Reich
Mary Alice C. Richardson
Joel A. Theisen
*Genevieve L. Ubel
E. George Widseth

*Denotes public member
**Denotes MSBA nominee

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

OPINION NO. 18

Secret Recordings of Conversations

It is professional misconduct for a lawyer, in connection with the lawyer's professional activities, to record any conversation without the knowledge of all parties to the conversation, provided as follows:

1. This opinion does not prohibit a lawyer from recording a threat to engage in criminal conduct;
2. This opinion does not prohibit a lawyer engaged in the prosecution or defense of a criminal matter from recording a conversation without the knowledge of all parties to the conversation;
3. This opinion does not prohibit a government lawyer charged with civil law enforcement authority from making or directing others to make a recording of a conversation without the knowledge of all parties to the conversation;
4. This opinion does not prohibit a lawyer from giving legal advice about the legality of recording a conversation.

Committee Comment

It has been the position of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility for over a decade that surreptitious recording of conversations by a lawyer constitutes unprofessional conduct. This position is consistent with that announced by the ABA Committee on Ethics and Professional Responsibility in Formal Opinion 337 (August 10, 1974). It is also the position held by the majority of state ethics authorities who have addressed the issue. The ABA and other state ethics authorities recognize that although secret recording is not illegal (provided one of the parties to the conversation consents to the recording), such conduct is inherently deceitful and violates the profession's standards prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. *See* Rule 8.4 (c), Rules of Professional Conduct and DR 1-102(A)(4), Code of Professional Responsibility. The committee agrees that in most instances secret recording violates these standards.

The exceptions provided for in this opinion recognize that in certain limited circumstances, the interests served by surreptitious recordings outweigh the interests protected by prohibiting such conduct through professional standards. For example, a lawyer who is the subject of a criminal threat ought not be subject to discipline for secretly recording the threat. The "in connection with the lawyer's professional activities" language is intended to limit application of the opinion to those situations where a lawyer is representing a client or is representing him or herself in a legal matter.

Another exception is secret recording in the criminal prosecution area where such conduct has become a recognized law enforcement tool provided it is done within constitutional requirements. *See e.g.*, ABA Formal Opinion 337 at page 3. The committee determined, however, that such an exception should also be recognized for lawyers engaged in the defense of a criminal matter. *See also*, Arizona Opinion No. 90-02; Tennessee Ethics Opinion 86-F-14 (a), July 18,1986); and Kentucky Opinion E-279 (Jan. 1984). Creating an exception only for prosecutors could create an imbalance raising potential constitutional problems. *See e.g., Kirk v. State*, 526 So.2d 223, 227 (La. 1988) (court found disparity between permitting prosecutors to secretly record and prohibiting defense lawyers was impermissible denial of equal protection).

The exception provided to government lawyers engaged in civil law enforcement similarly recognizes that to effectively protect the public, surreptitious recording is a necessary law enforcement tool. In certain areas such as consumer fraud, false advertising, deceptive trade practices and charitable solicitation, there may be few, if any, alternatives to surreptitious recording for effective enforcement. The exception also recognizes that during the investigative stage, a government lawyer may not be able to determine with certainty whether the violations are civil, criminal or both.

Finally, because surreptitious recording with the consent of one of the parties is not illegal, the committee determined that a lawyer should not be prohibited from advising a client about the legality or admissibility of such a recording. This exception is not intended, however, to permit non-lawyer employees or agents of the lawyer to record conversations in violation of this opinion. *See* Rule 5.3, Minnesota Rules of Professional Conduct.

OPINION 18:

SECRET RECORDINGS OF CONVERSATIONS

by

Marcia A. Johnson, Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (Nov/Dec 1996)

On September 20, 1996, the Lawyers Professional Responsibility Board adopted Opinion 18, *Secret Recordings of Conversations*. The opinion, with the committee comment which is incorporated as part of the opinion, is set out herein.

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The exceptions provided for in this opinion recognize that in certain limited circumstances, the interests served by surreptitious recordings outweigh the interests protected by prohibiting such conduct through professional standards. For example, a lawyer who is the subject of a criminal threat ought not be subject to discipline for secretly recording the threat. The "in connection with the lawyer's professional activities" language is intended to limit application of the opinion to those situations where a lawyer is representing a client or is representing him or herself in a legal matter.

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Finally, because surreptitious recording with the consent of one of the parties is not illegal, the committee determined that a lawyer should not be prohibited from advising a client about the legality or admissibility of such a recording. This exception is not intended, however, to permit nonlawyer employees or agents of the lawyer to record conversations in violation of this opinion. *See* Rule 5.3, Minnesota Rules of Professional Conduct.

RATIONALE

The opinion provides specific notice to lawyers of the long-held enforcement position of the Board and the Office of Lawyers Professional Responsibility that surreptitious recording of conversations by lawyers constitutes unprofessional conduct in violation of Rule 8.4(c), Minnesota Rules of Professional Conduct.[1] With Opinion 18,

[1] *Hoover, "Summary of Admonitions,"* Bench & Bar *(May/June 1984); Wernz, "Advisory Opinion Service," Bench & Bar (July 1986).*

Minnesota joins the majority of states that have considered the issue, in finding that surreptitious recording by lawyers is unethical.

The impetus for the Board opinion came last year. The Director's Office issued an admonition to an attorney for secretly tape recording several conversations he held with persons (potential parties) about the subject matter of a lawsuit he eventually filed against them. The lawyer appealed the admonition. The panel noted the director's enforcement position was in accord with the position held by the ABA since 1974, and with the majority of jurisdictions. Nonetheless, the panel dismissed the admonition on the following rationale:

1. There was no specific rule or opinion on the issue in Minnesota;
2. There are conflicting ethics opinions in other states on this issue;
3. The panel found no general understanding amongst lawyers that secret recording was unethical.

For these reasons, the panel believed that if there was to be a general prohibition as to secret taping by lawyers in Minnesota, it should be done by an explicit rule or opinion.

The issue was presented to the full board, which concurred that there was a need for specificity. The Board published for comment two draft versions of a proposed board opinion on secret taping in the March 1996 issue of *M$BA in brief*. The Board's opinion committee also specifically invited comment from certain law enforcement, public defense, and trial lawyer organizations. The bar responded with many diverse views and thoughtful comments.

Some comments questioned adopting any opinion that limited an attorney's right to do something otherwise legal. One described the draft opinion as "a death wish for the profession." Others recommended exceptions to the prohibition that would have swallowed, even engulfed, the rule itself. Several comments addressed the concern that prosecutors and criminal defense counsel were being treated disparately, and unfairly to defense counsel, with possible constitutional implications. Other

comments noted that threats against lawyers are not uncommon and that lawyers must be able to protect themselves. Finally, comments suggested that tape recording actually furthered the administration of justice, as it preserves the most accurate evidence of what was said.

The Board considered the concerns raised. The notion, that because secretly recording a conversation is legal it is ethical, does not follow. Lawyers, because of their duty to clients and the courts, are commonly constrained from otherwise "legal" actions. Procrastination is not illegal, but accounts for a sizable percentage of all ethics complaints. Further, to the extent that an *attorney's* surreptitious recording amounts to "deceit or collusion," it might not be legal.[2]

Similarly, the speculation raised that in this age of cellular phones and exploding technology, no one should assume that *any* conversations are private must also fail. Surely, for lawyers, technological possibility should not be the defining line for professional ethics. Orwell's *1984* now looms *behind* us, at least chronologically, but is Big Brother really something the legal profession is ready to embrace? The country is a generation past the Watergate scandals, but the black eye the profession received during that time is still discolored. Surely, allowing generalized secret taping by lawyers with no constraints would not elevate, but instead would cause to plummet the still flagging public confidence in the profession. In adopting Opinion 18, the Board determined that any potential evidentiary benefits to particular practitioners from permitting secret recording were simply outweighed by the generalized costs to the reputation of the profession.

Opinion 18 addresses several of the specific concerns raised in the comments by expanding those extraordinary circumstances under which a lawyer may ethically,

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[2] See *10 Minn. Stat. § 481.071 (1996) Misconduct by Attorneys. "Every attorney . . . who shall be guilty of any deceit or collusion, . . . shall be guilty of a misdemeanor.*

secretly tape.[3] The circumstances remain narrow and are limited primarily to those situations where protection of the public is paramount, where a client's liberty interests are affected, or where a threat of criminal action is conveyed against an attorney. Opinion 18 also permits a lawyer to advise a client about the legality or admissibility of secretly taping a conversation. It does not, however, permit a lawyer to *advise* or *direct* a client to tape conversations or provide a client with the necessary equipment and technical advice. From an ethical standpoint, there is a critical distinction between presenting an analysis of the legal aspects of client's secret recording and recommending such conduct or the means by which it might be accomplished. *See e.g.* Rule 1.2(d), MRPC, and Comment.

[3] *The director's prior enforcement position, consistent with the ABA, only allowed an exception from the general prohibition for criminal prosecutors.*

Trust Accounts: *Problems, Issues, and Solutions*

Kenneth L. Jorgensen, First Assistant Director, OLPR
Karen J. Welle, Legal Assistant, OLPR
Lynda J. Nelson, Legal Assistant, OLPR
Martin A. Cole, Senior Assistant Director, OLPR

8:30 **Overview of Lawyer Trust Accounts** - *Kenneth L. Jorgensen*

- *What constitutes client funds?*
  - Advance fee payments
  - Advances for costs & expenses
  - Settlement funds received
  - Escrow and closing funds
  - Settlement funds to be paid
- *What type of trust account should I use?*
  - Pooled
  - Separate
- *IOLTA*
- *Common problems with use of trust account*
- *Opinion 12 - who can sign the checks?*

9:15 **Retainers and the Trust Account**

- *Opinion 15*
- *Advance fee payments and availability or non-refundable retainers*
- *What constitutes an "accounting" to the client*
- *Fee disputes and the trust account*
- *Attorney liens*
- *Execution and levies upon the trust account*

9:45 **Trust Account Records Required by Opinion 9** - *Lynda J. Nelson*

- *Daily Records*
  - Check register/ledger - annotated
  - Cash receipts journal

- Checks - annotated
- Deposit tickets - annotated

- *Monthly Records*
  - Trial balance of client subsidiary ledgers
  - Reconciliation of trial balance, adjusted bank balance, cash balance and check register
  - Record retention - Rule 1.15(g), MRPC
  - Annual certification - Rule 1.15(h), MRPC

10:00 **Break**

10:15 **Using *Quicken® for Windows* to Maintain Trust Account Records** - *Karen J. Welle*

- *Setting up account*
  - New account
  - Existing account
  - Client as "category"
- *Entering Transactions*
  - How to deal with service charges
  - How to deal with IOLTA interest
  - Split transactions between clients
- *Reconciling the bank statement with the checkbook register*
- *Doing the subsidiary ledger trial balance*
  - First time set-up of report
  - Memorizing report for future use
- *Viewing or printing an individual client ledger*
- *General rules for using Quicken®*
  - Every transaction must have a category
  - Always use the same category name
  - Print reports and save in hard copy
  - No negative balances on client subsidiary ledgers

11:15 **Trust Account Overdraft Notification Program** - Rules 1.15(i)-(n), MRPC - *Lynda J. Nelson*

- *Approved financial institutions.*
- *How it works.*
- *Why overdrafts occur:*
  - Bank errors.
  - Service charges -- get a free account.
  - Late deposits.
  - Other common causes.

- *When overdrafts result in discipline:*
  - Shortages of client funds.
  - No response or an inadequate response.
  - Disciplinary file already opened or repeated overdrafts.
  - Surplus of attorney funds -- commingling.
  - Inadequate books and records.

11:35 **Lawyer Theft And The Client Security Board** - *Martin A. Cole, Assistant Director, Client Security Board*

- How it is funded.
- What can be paid? -- Rules of the MN Client Security Board.
- Limits on payments -- Rule 3.14.
- Relationship to lawyer discipline.

11:45 **Case Study** - *Kenneth L. Jorgensen*

- An examination of actual problems and violations which occurred and which resulted in lawyer discipline.

12:15 **Adjourn**

RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY,

RULE 30. ADMINISTRATIVE SUSPENSION

(a) Upon receipt of a district court order or a report from an Administrative Law Judge or public authority pursuant to Minn. Stat. § 518.551(12) finding that a licensed Minnesota attorney is in arrears in payment of maintenance or child support and has not entered into or is not in compliance with an approved payment agreement for such support, the Director's Office shall serve and file with the Supreme Court a motion requesting the administrative suspension of the attorney until such time as the attorney has paid the arrearages or entered into or is in compliance with an approved payment plan. The Court shall suspend the lawyer or take such action as it deems appropriate.

(b) Any attorney administratively suspended under this rule shall not practice law or hold himself or herself out as authorized to practice law until reinstated pursuant to paragraph (c). The attorney shall, within 10 days of receipt of an order of administrative suspension, send written notice of the suspension to all clients, adverse counsel and courts before whom matters are pending and shall file an affidavit of compliance with this provision with the Director's Office.

(c) An attorney administratively suspended under this rule may be reinstated by filing an affidavit with supporting documentation averring that he or she is no longer in arrears in payment of maintenance or child support or that he or she has entered into and is in compliance with an approved payment agreement for payment of such support. Within 15 days of the filing of such an affidavit the Director's Office shall verify the accuracy of the attorney's affidavit and file a proposed order for reinstatement of the attorney requesting an expedited disposition.

(d) Nothing in this rule precludes disciplinary proceedings, if the attorney's conduct also violates the Minnesota Rules of Professional Conduct.

DISCIPLINE FOR FAILURE TO PAY CHILD SUPPORT

by
Marcia A. Johnson, Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (Sept. 1996)

On June 13, 1996, the Supreme Court approved new Rule 30, Rules on Lawyers Professional Responsibility. The rule provides for administrative suspension of attorneys who are in arrears in paying child support or maintenance. The text of the rule can be found below:

RULE 30. ADMINISTRATIVE SUSPENSION

(a) Upon receipt of a district court order or a report from an Administrative Law Judge or public authority pursuant to Minn. Stat. § 518.551(12) finding that a licensed Minnesota attorney is in arrears in payment of maintenance or child support and has not entered into or is not in compliance with an approved payment agreement for such support, the Director's Office shall serve and file with the Supreme Court a motion requesting the administrative suspension of the attorney until such time as the attorney has paid the arrearages or entered into or is in compliance with an approved payment plan. The Court shall suspend the lawyer or take such action as it deems appropriate.

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(d) Nothing in this rule precludes disciplinary proceedings, if the attorney's conduct also violates the Minnesota Rules of Professional Conduct.

The rule met with little controversy during the notice and comment period provided by the Court, nor fanfare after its implementation. In fact, the new rule seeks only to hold attorneys accountable for child support and maintenance in the same manner as other licensed professionals in Minnesota.

ADDRESSING THE PROBLEM

Nonpayment of child support has become a major social problem in Minnesota and the country. Defalcations in court-ordered child support in Minnesota amounted to $551 million in 1994 and $604 million in 1995, according to the figures compiled by the Attorney General's Office. These numbers certainly aren't just about lawyers. But sadly, lawyers are included in these numbers. In the past year or two, the Director's Office has received complaints alleging lawyers to be in arrears in support or maintenance payments to the tune of $60,000 to $100,000.

Many collection techniques have been utilized by state child support enforcement agencies. Most of the efforts have proved both costly and ineffective. Federal law is now requiring states to use driver's license and occupational license revocation as a tool for enforcing child support and maintenance orders. Data available to date indicates that the threat of license revocation is a very effective and efficient tool for enforcing support orders.

In 1992, the Minnesota Legislature first enacted a statute (Minn. Stat. § 518.551(12)) providing for occupational license suspension for failure to pay child support. If the obligor is an attorney, because of constitutional separation of powers, the agency may report the matter to the Lawyers Professional Responsibility Board for "appropriate action in accordance with the Rules on Lawyers Professional Responsibility." The clear intent of the Legislature, while it could not mandate that result, was that the Lawyers Board also act so as to suspend an attorney's license for failure to pay child support.

In the spring of 1995, the Legislature amended Minn. Stat. § 518.551 to provide for additional procedural due process *before* reporting noncompliance to the licensing agency or the Director's Office. Before a public support agency makes a report of noncompliance to a licensing agency, the obligor must be three months in arrears in payments; the obligor has the opportunity to enter into a payment program; or the obligor has the right to a fully contested administrative hearing before an administrative law judge with appellate rights as set out in the Administrative Procedure Act.

As a result of the statutory changes, the Lawyers Board proposed the adoption of *administrative* suspension under its procedural rules. The Board's primary goals for dealing with this issue were to ensure fair treatment for lawyers, but also treatment that is as equal as possible to other occupational license-holders in this state. The advantages of administrative suspension are substantial: (1) the procedure is much faster and uses fewer scarce disciplinary resources than procedures under the Minnesota Rules of Professional Conduct; (2) as a support enforcement tool it provides a procedure which is as close to the treatment received by other occupational license holders as possible; (3) where noncompliance does not indicate unprofessional conduct, attorneys will not have a disciplinary record;[1] and (4) when an administratively suspended attorney becomes in compliance, there is an expeditious reinstatement process.

A BALANCED APPROACH

States that have specifically addressed failure to pay child support as it relates to lawyers have taken primarily two different tracks. Some, like Minnesota, use an administrative suspension approach. In Indiana, for example, upon receipt of an order from a court stating that an attorney has been found to be intentionally delinquent in

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[1] *Where noncompliance indicates a willful disobedience of a court order, the Director's Office will pursue concurrent disciplinary sanctions under existing rules (Rules 3.4(c) and 8.4(d), MRPC)..*

the payment of child support, the lawyers discipline system files notice with the Supreme Court seeking the attorney's suspension. The attorney is given notice and 15 days to respond. Other states have made failure to pay child support a disciplinary infraction. In Montana, notification to the Supreme Court of willful failure to pay child support will cause the Court to issue an order to show cause, in which the attorney has no right to relitigate the merits of the contempt order.

Not surprisingly, both administrative and disciplinary suspension proceedings in other states have tended to be summary in nature. The rationale therefore is clear. To suspend an attorney for professional misconduct via a state's substantive rules of conduct and normal procedural rules is a lengthy process with multiple layers of review. For example, in Minnesota, before a lawyer is publicly disciplined, he or she has the right to a hearing by a Lawyers Board panel, a Supreme Court referee, and the Supreme Court. The delay inherent in proceeding in the normal course would certainly thwart the enforcement impact for child support purposes.

In Minnesota, Rule 30 provides a balanced approach. Administrative suspension should provide a reasonably prompt and efficient means to enforce child support, and willful or intentional violations of a court order can also be handled under the Minnesota Rules of Professional Conduct, resulting in professional disciplinary sanctions in egregious cases.

DISPOSITION SUMMARY1996

SC/PROBATION 9 files 5 attorneys

ANDERSON, BRADLEY K.	C6-96-48	1
ANDERSON, JOHN T., JR.	C5-96-1482	3
BLACKMAR, THOMAS J.	C6-96-938	2
GRATHWOL, TIMOTHY O.	C4-94-2196	2
HEIM, PAUL M.	C5-96-42	1

SC/SUSPENSION 54 files 27 attorneys

DVORAK, SHIRLEY A.	C7-95-1179	1
FREDIN, CONRAD M.	C7-96-1080	1
GANLEY, JOHN GREGORY	C4-95-1379	1
GRZYBEK, JOHN E.	C4-96-128	3
GUST, ROBERT P.	C7-96-1077	1
HAUGEN, MARLON O.	C6-85-1544	4
HEAD, WYNETTE MICHAELLE	C0-95-2397	1
HOPKINS, DIANE E.	C3-95-2197	2
JENSEN, R. JAMES, JR.	C1-90-638	3
LALLIER, RAYMOND C.	C8-95-2065	2
MARICK, ANTHONY M.	C0-96-174	1
MCELRATH, LENZA, JR.	C0-95-1816	1
MCHAFFIE, RICHARD T.	CX-96-1235	3
MCNABB, GERALD	C6-95-2632	4
MOHAMMAD-ZADEH, KATAYOUN	C9-96-1078	1
O'TOOLE, TERRANCE S.	C0-96-1048	1
OLSON, RODNEY J.	C0-95-2044	2
OSTROOT, TIMOTHY VINCENT	CX-96-666	3
RUDEEN, H. KENT	C3-90-1404	1
SCHMIDTHUBER, L.M.	C3-95-2605	1
SHAUGHNESSY, STEPHEN W.	C0-90-95	3
SHEFFEY, RALPH E.	C8-94-922	6
SHINNICK, L.E.	C0-95-1217	1
SINGER, MICHAEL G.	C7-93-318	3
THOMAS, WILLIAM L.	C5-95-2525	1
WALLACE, JEFFREY T.	C4-94-321	2
ZOTALEY, BRYON L.	C1-95-982	1

DISPOSITION SUMMARY1996

SC/DISBARMENT 18 files 4 attorneys

DAVIS, DANIEL A.	C0-95-2545	8
HEIKKILA, NEIL D.	C2-96-1603	1
PLOETZ, JOHN W.	C7-96-2195	8
STROM, WARREN ELOF	C4-94-1551	1

SC/DISMISSAL 3 files 3 attorneys

HOULE, ANN ELIZABETH MCGINN	C8-95-2583	1
O'CONNOR, DAVID A.	C2-96-807	1
STRID, DENNIS W.	C4-88-1993	1

SC/DISABILITY 5 files 2 attorneys

HEXTER, CLAUDIA SUE	C4-96-47	1
SHORT, ERIC A.	C9-96-643	4

REINSTATEMENT 4 files 4 attorneys

LAWTON, JAMES J., III	C2-87-72	1
MACK, JOHN E.	CX-90-2713	1
SKONNORD, JAMES T.	C0-87-2385	1
THOMAS, WILLIAM L.	C5-95-2525	1

SC/ADMONITION/AFFIRMED 1 files 1 attorneys

IN RE PANEL NO. 94-17	C7-95-1666	1

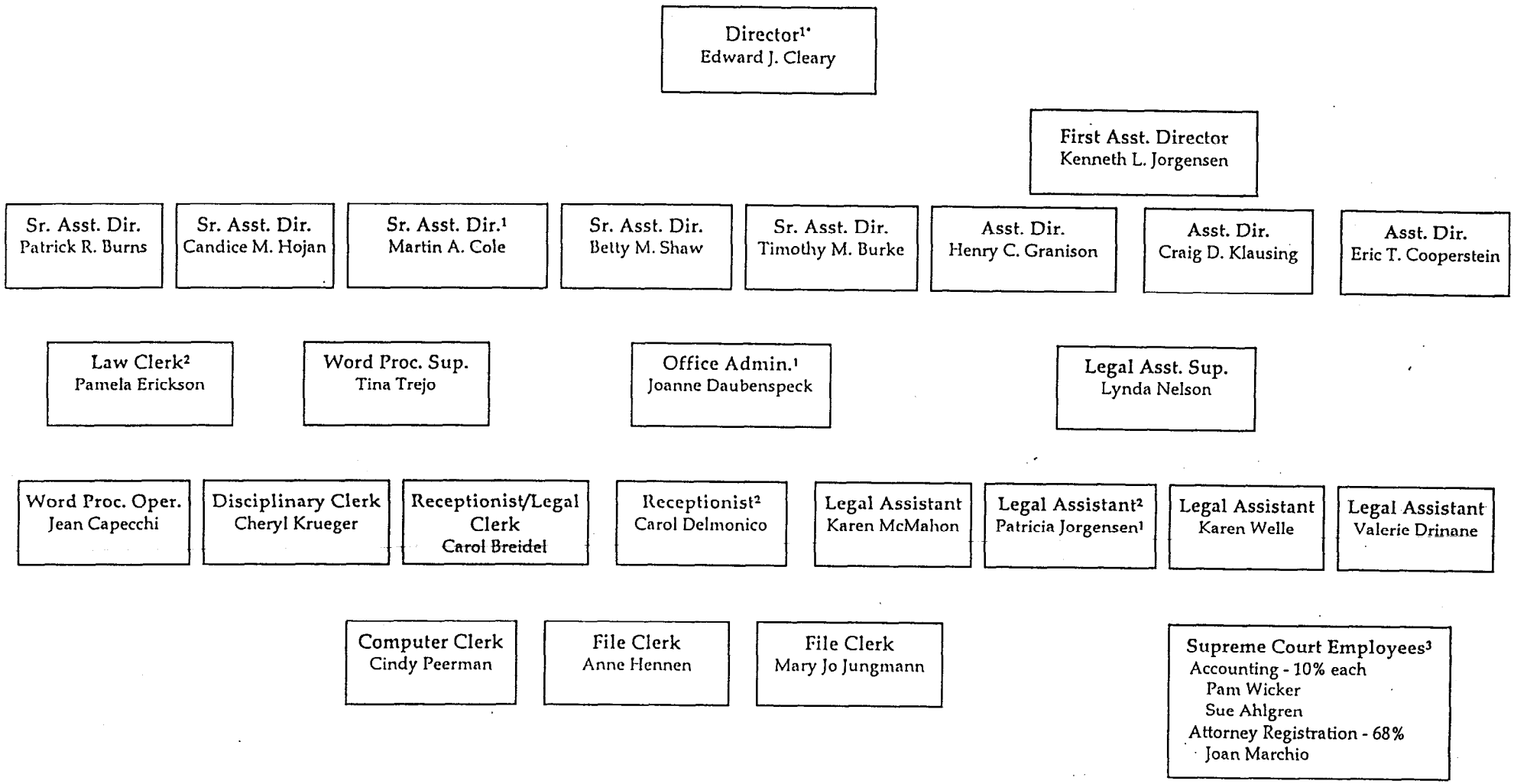
SC/ADMONITION/REVERSED 1 files 1 attorneys

IN RE PANEL NO. 95-30	C9-96-240	1

REINSTATEMENT PETITION DISMISSED 1 files 1 attorneys

DICKSON, EDWARD B.	CX-93-653	1

Office of Lawyers Professional Responsibility
FY'98 Organizational Chart



* Mr. Clearly has been appointed Director effective approximately August 1, 1997.

[1]Also Client Security Board Staff

[2]Part-time position

[3]Not administratively subject to Director's Office
Office pays percentage of their salary