Minneapolis STAR and Tribune

425 Portland Avenue MINNEAPOLIS, MINNESOTA 55488

January 7, 1986

Wayne Tschimperle
Clerk of Court
Minnesota Supreme Court
State Capital Building
St. Paul, Minnesota 55155

C4-85-697

Dear Mr. Tschimperle:

The proposed rule changes for the Board of Judicial Standards seem to increase the duration and extent of confidentiality provisions. This change puzzles members of the First Amendment Committee, which is an internal Star and Tribune committee that monitors the free flow of information.

The proposed changes puzzle us because the Board already seems to have an excessive degree of confidentiality in its proceedings. When complaints against public officials are being processed by a public agency, we would have thought the public would have ready access to information on the number of complaints, the nature of the complaints, the disposition of the complaints, and the reasons for the disposition. But this is not the approach the existing rules take, and the proposed rules seem to exacerbate the problem.

We would appreciate an opportunity to send a representative to appear at the public hearing on the proposed changes, where we would be prepared to make more detailed comments. In order to provide the most informative, focused discussion on the issues, it would be helpful if the Board could provide information regarding the following concerns, either at the hearing or in advance of the hearing.

1. What is the distinction that justifies granting a degree of confidentiality to investigations of judges that does not apply to other public officials under the Data Practices Act? Aren't city managers and school superintendents just as vulnerable to embarrassment by allegations of misbehavior?

2. What is the basis for treating judges, who are elected public officials, as if they were licensed professionals engaging in private business?

3. What legal concept is embodied in the reference to a judge's "right to confidentiality," in Rule 5(a)(3), and how does it apply to allegations of misbehavior?

4. What is the statutory basis for the plea bargaining provisions of Rule 6(g)?

5. What is the public policy justification for invoking secrecy in a situation where a tax-supported institution has reprimanded or imposed conditions upon an official elected by the voters, as does Rule 6(g)?

6. How does the Board judge the public's need for access to the information it collects, in light of the public's responsibility for electing judges and evaluating the functioning of public agencies such as the Board?

7. What right of access does the Board feel the public has to its administrative records (such as work and pay records that are generally public under the Data Practices Act) and to meetings dealing with administrative matters (such as the selection of an executive secretary)?

We look forward to the opportunity to respond to the answer to these questions, and present our views more fully.

Sincerely,

Rodgers Adams

Rodgers Adams
Chairman
First Amendment Committee

RA:cje

cc: First Amendment Committee
John R. Finnegan

MICHAEL J. HOOVER
ATTORNEY AT LAW
4640 WEST 77TH STREET, SUITE 104
EDINA, MINNESOTA 55435
PHONE (612) 893-9003

March 6, 1986

Mr. Wayne O. Tschimperle
Clerk of Appellate Courts
230 State Capitol
St. Paul, Minnesota 55155

Re: Judicial Board Rules Hearing--File C4-85-697

Dear Sir:

Enclosed for filing pursuant to the court's order please find ten copies of Request to Make an Oral Presentation and Statement of Michael J. Hoover in the above matter.

Very truly yours,

Michael J. Hoover

Michael J. Hoover

Encl:

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

Order for Hearing to Consider Amending Certain Rules of the Board on Judicial Standards	)	REQUEST TO MAKE AN ORAL PRESENTATION AND STATEMENT OF MICHAEL J. HOOVER

REQUEST TO MAKE AN ORAL PRESENTATION

Pursuant to this court's December 16, 1985 order in the above matter, the undersigned respectfully requests the opportunity to make an oral presentation on March 14, 1986.

STATEMENT OF MICHAEL J. HOOVER

INTRODUCTION

As American government has evolved the position occupied by the Judiciary is far different from that contemplated by our founders. Virtually every significant Legislative or Executive action is reviewed by the courts. In many ways the remotest branch of government has become the most powerful.

As the power of the courts has grown, so has public dissatisfaction. Being sued is for many an evil akin to death and taxes. Mysterious legal processes, unintelligible legalese, expense, acrimony, and delay almost always accompany litigation.

The growing authority of the courts, their remoteness from the people, and the vulnerability of the public to

judicial abuse all require the strictest accountability of judges.

In recent years Minnesotans have not been well served by the existing judicial disciplinary process. When I was Director of Lawyers Professional Responsibility, many citizens complained to me about the ineffectiveness of the judicial discipline system. Many attorneys who are perhaps afraid to speak publicly also echoed these criticisms privately. Recent notorious cases have raised the level of concern.

Only after interminable delay was Crane Winton removed from the district bench for a pattern of sexually exploiting vulnerable young persons and making false statements during the judicial disciplinary proceeding. Even then, Winton was not disciplined as a lawyer. Only as the Damocles sword of removal was about to fall upon him did John Todd resign from this court. The findings by the three-referee panel included dishonest conduct in connection with the Florida bar examination and abuse of his office by intimidating court personnel and others who had a role in the examination process. Because of his resignation, Todd never received formal judicial discipline and as in the Winton case, the Lawyers Board was prohibited by the court from pursuing lawyer discipline.

Much of the public and professional dissatisfaction with judicial discipline emanates from the perception that the process unfolds in a club-like atmosphere which is shrouded in secrecy, subject to interminable delays, plagued by ineffective procedures and prone to ad hoc decisions which smack of favoritism. One test to be applied to the proposed amendements is whether they offer meaningful reform in these areas of vital public concern. With all the respect due those who participated in their drafting, the undersigned strongly believes that several of the proposed rules primarily promote the personal interest of those individuals currently occupying judicial office rather than the public interest in vigorous and effective judicial discipline.

SUBPOENA POWER

Under proposed Rule 2 (e) the board's subpoena power would be severely limited. The board would retain subpoena power to aid in the prosecution of a proceeding only after the probable-cause stage. At the early stages of the proceeding it would rely upon the requirement that the judge cooperate with the process and tell the truth.

Ordinary folks are, of course, subject to being commanded to drop everything to attend depositions and court hearings and to produce documentary evidence. Administrative and legislative bodies have subpoena

authority. Grand juries have broad subpoena powers to determine whether there is probable cause. Even lawyer disciplinary proceedings provide for subpoena authority prior to the determination of probable cause. Other public officials can be subject to subpoena power when their own wrongdoing is being investigated. Such subpoena power has been held to reach even the President of the United States.

Judges preside over the subpoena processes which affect every other citizen. Yet they would exempt themselves from responding to a subpoena when their own wrongdoing is suspected.

No compelling reason has been advanced for the proposition that judges are so special that they should be exempt from the processes they require the rest of us to obey. It is true that as long as subpoena power is exercised by human beings there will be occasional errors and abuses. I personally agree that it is an abuse of subpoena power to attempt to investigate extra-marital affairs of judges when they involve other consenting adults and are otherwise unrelated to any judicial duty or matter before the judge. Nevertheless, the remedy for such isolated abuses is not to strip the board of subpoena power. Instead, the court can quash abusive subpoenas.

I am aware of the argument that proceedings to quash subpoenas may damage reputations before there has been any

determination that probable cause exists. The remedy in the judicial arena is the same as that in lawyer discipline proceedings. Litigation about pre-probable cause subpoenas can be conducted under pseudonym. See Rule 9(d), Rules on Lawyers Professional Responsibility.

The expectation that the board can rely upon the honesty and cooperation of judges in lieu of subpoena power in all cases is naivete at its extreme. In investigating thousands of cases of alleged lawyer misconduct, it is true that the vast number of lawyers under investigation respond honestly and completely to the board's inquiries. Nevertheless, I have seen enough cases of misrepresentation, altered documents, and other dishonest responses to Lawyers' Board inquiries to know that subpoena power is an essential attribute of an effective and vigorous discipline agency. I am sure that the existence of subpoena power deters misrepresentation and non-cooperation in some cases. In others in permits the discipline agency to discover the truth despite misrepresentation in non-cooperation.

Obviously, any subpoena power must be used with great discretion. The board's scarce investigative resources should not be squandered by overuse of subpoenas to verify every minor fact in every minor case. Nor should the subpoena power be used for witch hunts. Nevertheless, it should be available to verify information where serious

misconduct is alleged or in any other case where there is some substantial reason not to rely solely upon the representation of the person under investigation that the information provided is accurate and complete.

So long as the rest of us are subject to the broad subpoena powers of courts, legislatures, and administrative agencies, judges should not be exempt from the processes which they oversee. If the board properly supervises the executive director, and if the board's actions continue to be subject to judicial review, the protection afforded individual judges under investigation and the judiciary generally is already adequate.

PUBLICITY

Another weakness of the proposed rules is the perpetuation and expansion of the shroud of secrecy which surrounds judicial discipline proceedings. This is an issue which also plagues lawyer discipline. Lawyers have long argued that the effect of publicity of investigation on their private law business is devastating. Consequently, rules have been devised to hold lawyer discipline proceedings in confidence until there is a finding of probable cause that discipline is warranted.

The current Judicial Board rules balance confidentiality versus publicity in the same way. The proposed rules would change this to delay even further the

public acknowledgment of charges against the judge until the judge had an opportunity to file his or her answer along with the charges. While this proposal is touted by its proponents as procedural rather than substantive, it is an open question how such a rule would have affected the Todd case.

In my opinion, judges are entitled to no different protection than lawyers when it comes to publicity about charges of unprofessional conduct. Indeed, they may be entitled to even less confidentiality. Unlike attorneys, they are not in private business. They are instead public elected officials. In lawyer discipline proceedings the subject matter of discipline is usually conduct occurring in a private law practice. In judicial proceedings the subject matter is often an abuse of public trust.

The contrast between judicial disciplinary proceedings and those involving other public officials is striking. All of the removal proceedings involving Kathleen Morris, a publicly elected county attorney, and all proceedings involving the possible removal of Representative Randy Staten from the Legislature have been surrounded by the glare of publicity. Arguably, judges should be treated in exactly the same way as legislators and executive branch officials. In no event should the line be drawn any further toward secrecy than it is already.

As a passing comment, proposed Rule 1(d)(6) provides that the executive director shall compile statistics for the board and the court. Rule 1(h) provides that the board shall prepare an annual report, copies of which may be made available to the public by a majority vote of the board. These rules should be changed to require that such information absolutely is available to the public and is not a matter of board discretion.

Minnesotans have a right to general information about the workings of this tax-supported board including the kinds of cases in which the board is imposing private discipline instead of acting publicly. As things now stand Minnesotans receive little more information about the Judicial Board than they do about the CIA.

BOARD PERSONNEL

Rule 1A provides that attorney members of the board must have at least ten years experience as practicing lawyers. Ironically, since the board includes public membership, the only group disqualified from service on the board is that half of the bar with less than ten years experience.

The disqualification of young idealistic attorneys is particularly unfortunate. The appearance is that only after attorneys have paid "club" dues for ten years are they

qualified to pass on issues of judicial discipline. In my opinion, this rule is exactly upside down.

By disqualifying newly admitted lawyers from board membership, the judicial discipline process is deprived of persons who have special insight. As newly admitted lawyers they have not become so established in the profession as to have lost the common-sense insights so often provided by public members of judicial boards. Yet they also possess a working knowledge of legal principles and procedures, a trait some of the best public members of judicial boards have lamented they do not possess. In short, young attorneys can provide the strengths of both sensitivity to public needs and legal knowledge.

I would go so far as to suggest that at least one of the attorney seats on the Judicial Board should be reserved for young attorneys. Certainly they should not be disenfranchised.

LAWYER DISCIPLINE

On its face Rule 13(g) would appear to be an improvement over existing Rule 12(g). The proposal would require the court to notify the Lawyers Board when it receives a Judicial Board recommendation for judicial removal in order to afford the Lawyers Board an opportunity to be heard on the issue of lawyer discipline. The current

rule requires notice to the Lawyers Board only after the court decides to remove the judge.

The proposed rule appears to be very clear and mandatory. While the current rule is admittedly somewhat awkward in that it requires notice only after the court has decided to remove the judge, it is also clear and apparently mandatory. Yet in the only two cases to have arisen after adoption of current Rule 12(g) (Winton and Todd) the Supreme Court and the Court of Appeals acting as Special Supreme Court did not notify the Lawyers Board or give it an opportunity to be heard on the issue of lawyer discipline. Instead, the court summarily determined that no lawyer discipline would be imposed.

Todd and Winton illustrate that whether there is a rule and whether it will be enforced are two separate issues. The Lawyers Board has already expressed its concern over the Winton and Todd cases.

As Director I held my counsel when the first case (Winton) was decided, but was publicly critical when the second case (Todd) occurred. With all due respect it is my opinion that the actions of the courts in Winton and Todd were a disservice both to the profession and the public.

In both cases, judicial miscreants were allowed to remain in the ranks of the legal profession without giving the Lawyers Board an opportunity to be heard despite the

existence of a rule which clearly mandates notice and the right to make a presentation. The supreme irony is that self-regulation by the legal profession, a principle upon which praise is lavished in one disciplinary case after another, was not given an opportunity to work in the Winton and Todd cases. By refusing to even hear the Lawyers Board, both the profession and the public were denied the process which is so solicitously given to even the most corrupt lawyer or judge.

While I support proposed Rule 13(g) as an improvement over existing Rule 12(g), the existing rule is neither impossible nor unworkable. What has been missing is a commitment to apply the rule. The fate of Rule 13(g) if it is adopted will likewise depend upon the commitment of the courts which are bound to apply it. Each time such a clear rule is bypassed, the appearance that the law has exemptions for favorites fuels the already latent public skepticism about the effectiveness of self regulation.

Conclusion

In my view the judicial disciplinary process has been plagued by delay, cumbersome procedures, and inadequate power. The proposed changes do nothing to eliminate these problems and in some cases worsen them. The proposed limitations on subpoena power are a prime example.

Respect for judicial disciplinary procedures has been undermined by the shroud of secrecy surrounding them. The

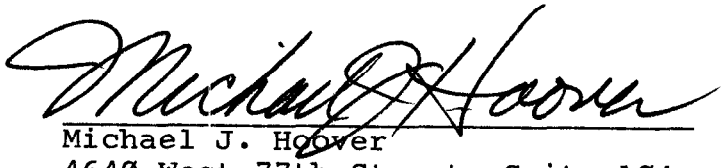
proposed rules worsen this problem by continuing limited public access to information about the overall workings of the system and by extending secrecy in individual disciplinary proceedings.

The judicial disciplinary process has suffered from the perception that it occurs in a club-like atmosphere. The continued disqualification of recently admitted attorneys from membership on the board only perpetuates this perception.

The proposal to notify the Lawyers Board when there is a removal recommendation is an improvement over current procedure. The reform needed here however is not a rewritten rule but a renewed commitment to scrupulously observe procedures in all cases.

In the lawyer discipline field there has been much reform in the last decade. Some now believe that reform is complete. Others believe it has gone too far and should be at least partially dismantled. In the judicial discipline field, however, I fear that even if the proposed rules are adopted, reform will not even have begun.

Respectfully submitted,



Michael J. Hoover
4640 West 77th Street, Suite 104
Edina, Minnesota 55435
(612) 893-9003
Attorney Registration No. 47053

March 7, 1986

From: Robert M. Shaw
To: Members of the Minnesota Supreme Court
Subject: My request to file a statement, and the statement itself, concerning certain proposed amendments to the Rules of the Board on Judicial Standards. C4-85-697

1. I hereby request that my written statement be considered by the court.

2. Here is the statement. I make it only as an interested member of the public.

I have comments about two proposed rules: 13(g) and 1(h).

With respect to proposed rule 13(g), it seems to me that the proposed rule is somewhat clearer, and therefore preferable to, existing rule 12(g). The new rule seems to make crystal clear that the Lawyers Board must be given the opportunity to consider the fitness of a judge - when he is recommended for removal - to practice law.

The rule would, in my view, be strengthened with some sort of wording which would require all this to take place promptly. Perhaps the word "forthwith" or the words "as soon as possible" might suffice. Else, this process might well drag on interminably

Some of the public members of the Lawyers Board thought that the old rule 12(g) also was crystal clear in laying down the principle that no judge could be immune from lawyer discipline. In my view, it was a grievous error for you to command the Lawyers Board not to proceed in the Todd matter. That act, and also your action vis-a-vis Judge Winton, has left the clear impression in the minds of many people that you believe a judge may be unfit to be a judge but may still freely practice law.

With respect to proposed rule 1(h), I recommend that the word "may" be changed to "must." I see no reason why the Board on Judicial Standards, or any other public body, should not make its statistical information fully known. In fact, I believe that such a board, supported by public money and carrying out a public trust, should at all

times freely furnish statistical - and any other-information not directly relating to a particular judge - to the public at all reasonable times.

Respectfully,

Robert M. Shaw
5408 Kellogg Ave.
Edina, MN 55424

2-6-86

STATE OF MINNESOTA
DISTRICT COURT, SECOND DISTRICT
SAINT PAUL 55102

HYAM SEGELL
JUDGE
ROOM 1409
COURT HOUSE

STEVE JANICEK, JR.
OFFICIAL COURT REPORTER
TEL. 298-4101

Wayne O. Tschimperle
Clerk of the Appellate Courts
230 State Capitol
St. Paul, Minnesota 55155

RE: C4-85-697
Hearing to Consider Amending
Certain Rules of the Board
on Judicial Standards

Dear Mr. Tschimperle:

I am enclosing ten copies of material which I would like to present orally at the hearing in the above on March 14, 1986. Kindly convey my request to do this to the Supreme Court.

Thank you for your cooperation.

Yours very truly,

Hyam Segell

HS:boc

Enc.

STATE OF MINNESOTA
IN SUPREME COURT
C4 85 697

In Re:

Hearing to Consider Amending
Certain Rules of the Board
on Judicial Standards

Presentation by
Hyam Segell

I. Procedural History of Rule 2(e)(1).

Laws 1971, Chapter 909, Sections 1 through 4, created the Board on Judicial Standards. In Laws 1973, Chapter 214, Section 1, it was determined that judicial disciplinary proceedings would be applicable to all judges, judicial officers, and referees. These sections, together with a series of amendments which have been enacted through the years, are now codified as Minnesota Statutes Annotated, Sections 490.15, 490.16, and 490.18. Pursuant to authority granted to the Supreme Court in M.S.A. 490.16, Subd. 5, Rules of the Board on Judicial Standards were adopted on July 5, 1978. The hearing today is to determine how those Rules should be amended.

Present Rule 2(e)(1) provides for the use of a subpoena by either the Board or the judge being investigated before the issuance of a complaint against that judge. (See Exhibit A-1). In other words, a subpoena may be used to compel the attendance

of witnesses or for the production of documents at all stages of a proceeding before the Board. The Committee which has prepared some amendments to the Rules of the Board now proposes to eliminate the use of a subpoena during the pre-complaint stage of a proceeding against a judge and permit it to be used only after a complaint has been filed. (See Exhibit A-2) The presenter has prepared a draft which is something of a compromise between present Rule 2(e)(1) and the recommendation proposed by the Committee and would permit the use of a subpoena during the investigative stage of a proceeding; however, the subpoena could only be used in extraordinary circumstances and only after approval of a majority of the Board. (See Exhibit A-3).

II. The Need for a Subpoena.

The presenter is a former member of the Board on Judicial Standards. During his membership, the Board had the right, as did the judge being investigated, to use a subpoena for the production of witnesses or documents prior to the issuance of a complaint. This power was used but rarely and never without consultation with the Board. There really are very few occasions when the use of a subpoena is necessary, and it was only in those cases where the Board felt it necessary that it was ever considered or used. A subpoena is a shield as well as a sword, and its use by the judge being investigated in a serious case is as important to him as its use by the Board in conducting

the investigation. In a serious matter, no judge should be deprived of the opportunity to present to the Board witnesses and documents which might strongly suggest that a complaint should not be filed against him. In some cases, this opportunity could be afforded only by means of a subpoena.

It is important to note that in the Rules on Lawyers Professional Responsibility, adopted November 1, 1976, Rule 8(b) permits the Director of the Board of Professional Responsibility, with the chairman or vice chairman's approval, to use a subpoena in almost all circumstances when the Director is conducting an investigation of the possible unprofessional conduct of a lawyer. (see Exhibit B). It is of even greater importance that the Supreme Court Advisory Committee on Lawyer Discipline has recommended no change in the Rule. This Rule is much broader in scope than the compromise offered by the presenter and gives the Director of the Lawyers Board full power to investigate an errant lawyer. To suggest, as the Judges' Committee has done, that judges are entitled to greater protection than lawyers, is the height of fatuousness.

The rationale employed by the Committee in eliminating the use of a subpoena before a complaint is issued is specious and can be extremely detrimental to a judge. Members of the Committee have informally stated that "we can always issue the complaint, and if we need more information we can then use the subpoena". That, apparently, is one of the reasons the Committee

has added Rule 2(e), Subpart (1), which is designed to force a judge to furnish all material without the need of a subpoena and if he or she refuses, file the complaint and obtain the material later through the use of the subpoena. The problem is that he may not have the material needed, and judges should not be bludgeoned by rules of the Board on Judicial Standards, nor should they be forced into the position where complaints are filed against them simply because they are uncooperative or simply because the Board does not have sufficient investigative power prior to the issuance of a complaint.

In an article which appeared in the Minneapolis Star and Tribune on December 23, 1985, a number of people who have been involved in judicial disciplinary proceedings were asked by the writer of the article to comment on the elimination of the subpoena in the pre-complaint setting. While they all had a number of harsh things to say about that, there were two criticisms made which the Supreme Court should very seriously consider before allowing an amendment in the form prepared by the Committee. Jack Frankel, the Director and chief lawyer for the California Commission on Judicial Performance, pointed out the difficulty that would be presented in investigating a serious matter. The presenter can foresee situations where the Executive Secretary of the Board on Judicial Standards would be totally disabled from conducting an investigation, and the judge's cooperation would not even be sought or would be meaningless. For example,

if the judge were under investigation for a charge of falsifying his vouchers for mileage reimbursement, the Executive Secretary might very well want to investigate records that were in the hands of state employees or automobile repair records which might reveal odometer readings, or perhaps other records which simply could not be obtained from the judge. In a case where a judge was being investigated for allegedly accepting bribes, the Executive Secretary might first want to go to banks or savings and loan associations to examine their records. In both of these situations, if the Executive Secretary did not have available the power of subpoena, his hands would be tied. The other criticism which the presenter believes is valid is that the elimination of the subpoena power prior to the issuance of a complaint would turn the present Board on Judicial Standards into one of the weakest in the nation.

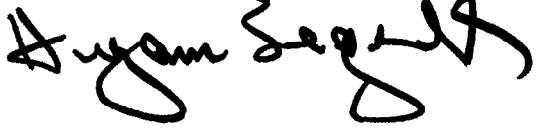
III. Conclusion.

Since the creation of the Board on Judicial Standards, there has been the occasional claim that there have been abuses in the conduct of investigations. Whenever an investigative agency is looking over one's shoulder, some people are gripped by fear, if not feelings of persecution. One one occasion when George J. Kurvers was Executive Secretary, the Board authorized his use of a subpoena in connection with an investigation of a judge, and a District Court trial judge promptly quashed it. Simply because it was quashed and the ruling was upheld by the

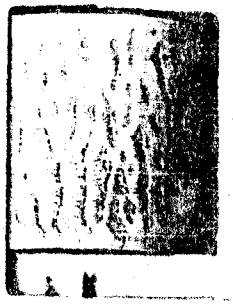
Supreme Court hardly qualifies its issuance as an abuse. It was no more than a judgment call by the Board itself. It might be worth noting that Mr. Kurvers who had retired as Chief of Intelligence of Internal Revenue Service in this region after a long and distinguished career there was not one to abuse authority. He did not achieve the important post he held in IRS by bending rules or breaking them, and he did not bend or break the Rules of the Board on Judicial Standards. Although he was a diligent and competent trained investigator and employed his talents as such whenever the circumstances and occasions required, it would be folly today to say that we should do away with the subpoena power because of the way in which George Kurvers conducted investigations.

To deprive the Board on Judicial Standards and its Executive Secretary of the one tool which would enable it to continue as an effective disciplinary organization is lacking in good sense and will create the perception with the public that we as judges will do anything to protect ourselves and that we should be treated differently from lawyers. That, too, would be folly. We in Minnesota have, for the most part, judges who are competent and honorable and whose conduct does not bring the judicial office into disrepute. To keep it that way requires two things: 1) merit selection and 2) an effective disciplinary system. Since we do not have the former, let us not emasculate the latter.

Respectfully submitted,



RULE	RECOMMENDATION	COMMENTS
Rule 2 **(d) Jurisdiction Over Former Judge.** The Lawyers Professional Responsibility Board shall have jurisdiction over a lawyer who is no longer a judge with reference to allegedly unethical conduct that occurred during or prior to the time when the lawyer held judicial office, provided such conduct has not been the subject of judicial disciplinary proceedings as to which a final determination has been made by the supreme court. (Source: ABA Std. 3.2) **(e) Subpoena and Discovery.** (1) At all stages of a proceeding under these rules, both the board and any judge being investigated shall be entitled to compel by subpoena the attendance and testimony of witnesses, including the judge as witness, and to provide for the inspection of documents, books, accounts, and other records. (2) The power to enforce process may be delegated by the supreme court. (Source: ABA Std. 4.18-4.19)	(e) Subpoena and Discovery. (1) During the investigative stage of a proceeding, prior to a finding of sufficient cause to proceed pursuant to Rule 8, failure or refusal of a judge to cooperate or the intentional misrepresentation of a material fact during any stage of a disciplinary proceeding may constitute conduct prejudicial to the administration of justice. (2) At all other stages of the proceeding following a finding of sufficient cause to proceed pursuant to Rule 8, both the board and the judge being investigated shall be entitled to compel, by subpoena, attendance and testimony of witnesses, including the judge as a witness, and the inspection of documents, books, accounts and other records. (3) The power to enforce process may be delegated by the Supreme Court.	(e) Subpoena and Discovery. (1) During the investigative stage of a proceeding, prior to a finding of sufficient cause to proceed pursuant to Rule 8, failure or refusal of a judge to cooperate or the intentional misrepresentation of a material fact during any stage of a disciplinary proceeding may constitute conduct prejudicial to the administration of justice. (2) Whenever, during the investigative stage of a proceeding, the executive secretary makes a showing of necessity and obtains the approval of a majority of the Board, the executive secretary shall be entitled to compel by subpoena the attendance and testimony of witnesses, including the judge being investigated, and to provide for the inspection of documents, books, accounts, and other records. (3) The judge being investigated shall, at all stages of a proceeding under these rules, have the same subpoena power granted to the executive secretary in the preceding paragraph (4) The power to enforce process may be delegated by the Supreme Court.
Exhibit A-1	Exhibit A-2	Exhibit A-3



Chairman or his designee within that time shall notify the Director of the reasons for the delay.

(d) Removal. The Director may at any time and for any reason remove a complaint from a District Committee's consideration by notifying the District Chairman of the removal.

(e) Notice to complainant. The Director shall keep the complainant advised of the progress of the proceedings.

(Amended July 22, 1982.)

RULE 8. DIRECTOR'S INVESTIGATION

(a) Initiating investigation. At any time, with or without a complaint or a District Committee's report, the Director may make such investigation as he deems appropriate as to the conduct of any lawyer or lawyers.

(b) Investigatory subpoena. With the Board Chairman or Vice-Chairman's approval upon the Director's application showing that it is necessary to do this before issuance of charges under Rule 9(a), the Director may subpoena and take the testimony of any person believed to possess information concerning possible unprofessional conduct of a lawyer. The examination shall be recorded by such means as the Director designates. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the examination.

Exhibit B

3/7/86

Minneapolis STAR and Tribune

PATRICIA A. HIRL
Associate General Counsel
(612) 372-4171

425 Portland Avenue MINNEAPOLIS, MINNESOTA 55488

March 6, 1986

Wayne Tschimperle
Clerk of Court
Minnesota Supreme Court
State Capital Building
St. Paul, Minnesota 55155

C4-85-697

Dear Mr. Tschimperle:

I will be appearing at the Court's hearing regarding the Rules for the Board of Judicial Standards on Friday, March 14, 1986.

Mr. Rodgers Adams had requested to appear, but he will not be able to do so. I will appear in his stead.

Sincerely,

Patricia A. Hirl

PAH:cje

cc: Rodgers Adams

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

In re Proposed Rules on Board of Judicial Standards	)))	Recommended Amendments Submitted by Patricia Hirl for the Minneapolis Star and Tribune

1. We recommend that Rule 1(d) be amended to make clear that statistics concerning the Board's operations be made available to the public.

(d) Duties and Responsibilities of Executive Secretary. The executive secretary shall have duties and responsibilities prescribed by the board, including the authority to:

(1) Receive information and allegations as to misconduct or disability;

(2) Make preliminary evaluations;

(3) Conduct investigations of complaints as directed by the board;

(4) Recommend dispositions;

(5) Maintain the board's records;

(6) Maintain statistics concerning the operations of the board and make them available upon request to the board, ~~and~~ to the Supreme Court, and to the public;

(7) Prepare the board's budget for approval by the board, and administer its funds;

(8) Employ and supervise other members of the board's staff;

(9) Prepare an annual report of the board's activities for presentation to the board, to the Supreme Court, and to the public;

(10) Employ, with the approval of the board, special counsel, private investigators, or other experts as necessary to investigate and process matters before the board and before the Supreme Court. The use of the attorney general's staff prosecutors or law enforcement officers for this purpose shall not be allowed.

2. We recommend that Rule 1(g) be amended to make clear that those meetings or portions of meetings of this Board that do not involve discussion of the investigations regarding individual judges be open to the public.

(g) Meetings of the Board. Meetings of the board shall be held at the call of the chairperson; the vice-chairperson; the executive secretary; or the written request of three members of the board and shall be open to the public except for discussions of the investigations of individual judges. (Source: present rule A[6].)

3. We recommend that Rule 1(h) be amended to make it consistent with current Rule 1(d)(9)'s mandate that annual reports be made available to the public.

(h) Annual Report. At least once a year the board shall prepare a report summarizing its activities during the preceding year. One copy of this report shall be filed with the chief justice of the supreme court and other copies may be made available to the public ~~by a majority vote of the full board~~. (Source: present rule A[7].)

4. We recommend that Rule 5(a)(1) be maintained in its present form and that the Board's determination of probable cause become public when filed with the Supreme Court.

5. We recommend that Rule 5(a)(3) be amended to make clear that the confidentiality of proceedings is not a judges "right" but is done to protect the judicial system itself. However, it should allow judges to bring any stage of the proceedings to public attention.

> (3) A judge under investigation may ~~waive his right to confidentiality~~ make public any documents or proceedings at any time during the proceedings.

6. We recommend that Rule 5(b) be maintained and strengthened so as not to silence all comment from the Board in cases where their actions are already public knowledge.

> (b) Public Statements by Board. In any case in which the subject matter becomes public through independent sources or through ~~a waiver of confidentiality by~~ the judge, the board may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the judge to a fair hearing without prejudgment, and to state that the judge denies the allegations. ~~The statement shall be first submitted to the judge involved for his comments and criticisms prior to its release, but he board in its discretion may release the statement as originally prepared.~~ (Source: ABA Std. 4.9)

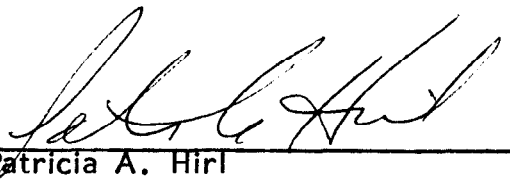
7. We recommend that new Rule 5(d) be stricken in its entirety because it is overbroad and appears to prohibit speech which concerns many non-confidential areas of Board activities. Board members should be able to communicate to the public they serve about the administration of the Board and other matters not directly related to the investigation of charges

against individual judges. We believe this section deprives board members of their rights of free speech without a showing of a substantial interference with a significant governmental interest.

8. We recommend that current Rule 6(f)(3) be retained in its entirety so as to allow the Board to inform the public about its findings when allegations of misconduct have already become widely known. The purpose of keeping its investigations confidential are, at this point, moot and public statements that refuse to confirm that the Board has examined the situation can only make the Board look like it is failing to do its job.

9. We recommend that any sanction ordered by the Board under Rule 6(g)(iii) that restricts the activities of a sitting judge should be made public because it is a sanction that has a direct impact on the judge's conduct. We believe voters have a right to know of any such restrictions.

Respectfully submitted,



Patricia A. Hirl

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4/21

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Thomas R. O'Connell
Dan O'Connell

February 20, 1986

Clerk of the Appellate Court
230 State Capitol
St. Paul, MN 55155

Re: Order for Hearing to Consider Amending Certain Rules of the Board of Judicial Standards

C4-85-697

Dear Clerk:

Enclosed for filing please find an original and ten copies of a Statement by Theodore J. Collins Pursuant to Order of December 16, 1985.

This letter will also confirm that I will be present on March 14, 1986, to present my objections to the proposed Rules.

Very truly yours,

THEODORE J. COLLINS

TJC/pao

Enclosure

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

Order for Hearing to Consider Amending Certain Rules of the Board of Judicial Standards.

STATEMENT OF THEODORE J. COLLINS PURSUANT TO TO ORDER OF DECEMBER 16,1985

My name is Theodore J. Collins and I am an attorney licensed to practice in the State of Minnesota. I make this statement pursuant to this Court's Order of December 16, 1985, in the above-captioned proceeding.

I understand the Court has under consideration various recommendations of a committee formed to study the existing Rules of the Board of Judicial Standards. I further understand that recommendations have been made to change some, but not all, of the existing Rules.

I wish to address my remarks to certain of the proposals made by the Ad Hoc Committee.

Rule 1. Suggested change in this Rule eliminates a section of Rule 1(e), Duties and Responsibilities of the Executive Secretary and places the Executive Secretary directly under the control of the Board in his conduct of investigation. This is done by eliminating 1(e)(3) "Screen Complaints" and amending 1(e)(4) "Conduct Investigations" by making the same read, "Conduct Investigation of Complaints as Directed by the Board;".

I feel that these changes are ill-advised for a number of reasons. If the Executive Secretary is not allowed to screen complaints and to place complaints in some kind of priority, the Board, with a non-compensated once a month effort,

will be overwhelmed with complaints which could be effectively screened by any person who should be employed as an executive secretary. At the same time the Volunteer Board will be required on a month-to-month basis to direct investigations of complaints. The investigations will necessarily be impeded and delayed since the investigations course cannot be looked at except at monthly meetings of the Board and in the interim the executive secretary will have to do no more than the Board has authorized it at the last meeting, no matter what the situation. The change will undoubtedly embarrass the Board and make it completely ineffective since it amounts to an investigation by the fact finder when the fact finder is but a part time body which must reach consensus in order to act at all. While all things human can err, if there is to be an effective review of the judicial offices granted by the people and held by individuals from time to time, there must also be some reasonably prompt and professional investigation of complaints so as to make possible meaningful Board action upon them.

Rule 2(d). Subpeona and Discovery has been changed so as to provide that there will be no subpeona power during the investigative and evaluative stage of a proceeding. This change in the Rules all by itself will make ineffective any discipline of judges in the State of Minnesota. The provision that failure to cooperate is itself a grounds of discipline adds nothing to the existing law since such is already the law for lawyers and all judges are lawyers.

The discipline of judges is a very difficult matter given the power that judges exercise and the almost absolute power that is often exercised by judges in their own chambers and clerk's offices. If a judge tells subordinates not to cooperate with an investigation, the inability of a investigator to obtain the documents from unwilling custodians will effectively destroy the ability to get facts and negate any

disciplinary process. The proposed change will be denying a subpeona in all stages of the proceeding be also inconsistent with later provisions which require that a hearing on all matters in a confidential forum. The absence of a subpeona removes any effective method of enforcing the rights of the public and the Board in determining the facts so as to be able to act responsibly in a confidential forum.

Rule 3. Immunity: This provision should be strengthened if the committee's interest is to help Board members and other persons associated with judicial discipline. Attached hereto is an example of suits reaching even law clerks which may be brought and may denigrate the process of judicial discipline by making all associated with it pay a price, whatever their conduct. (See attached Complaint of John J. Kirby vs. Board on Judicial Standards, George J. Kurvers, Hy Applebaum, Thomas R. Bredeson, Honorable Wayne Farnberg, James J. Schumacher, Honorable Hyam Segell, Gerald C. Stoppel Janna Merrick, Raul Salazar, in their capacity as members of the Board on Judicial Standards, Theodore J. Collins, John R. Schulz, John Knutson).

Rule 5. Confidentiality: Has been changed by the addition of language proposed in Rule 5(a)(1) to provide that confidentiality does not cease until the formal statement of charges and Answers thereto have been filed with the Supreme Court pursuant to Rule 9. This rule is different than the rule in lawyer's discipline and criminal matters; it has no purpose other than to delay and perhaps frustrate the discipline process. In some cases there have been attempts to have a filed formal statement of charges become unfiled, and given the importance of the public knowing what is taking place in the judiciary and its disciplinary process, once a formal statement of charges has been voted by the Board, there is no reason that that action should be known by the public. It could happen that an answer would never be filed to the charges. In such a case the Supreme Court would have to decide when it

would make a matter public which had been confidential long after any need for confidentiality, either because of public condemnation of the conduct which was the subject of the statement of charges or because of lack of response by the person charged, was necessary.

Rule 6(f)(2) has an amendment proposed which would change the existing law and remove sources of information which should be available to the Board. Past conduct of a professional whether lawyer, judge or other, should be open to the disciplinary authority if for no other reason than consistency. If the closed files of the Board are to have no meaning to the subsequent Board, perhaps they should be destroyed.

Rule 6(f)(3) will, if deleted, cause additional problems for the judicial discipline process. In matters of great public interest the judicial third of government will be left without an effective spokesman for the judicial process and judicial discipline. All others, including the object of the notoriety, may freely comment upon a matter, while the body charged with judicial discipline may say nothing.

Rule 6(c): "Screening" as the amendment is proposed would be inconsistent with the amendment which takes away from the Executive Secretary the power of screening. If the Executive Secretary is without the power to screen the complaints, it is difficult to know what purpose is served by reports of screening to the Board which itself does the screening. Even more, the investigations of the Executive Secretary upon which the Board is to act and determine whether there are grounds to discipline would be hard to reach for the reasons set forth on Rule 2.

I will be present to present my objections to the proposed Rules on March 14, 1986, at 11:00 a.m.

2-20-86

Theodore J. Collins
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St. Paul, MN 55101
(612) 227-0611
Attorney Registration No: 18065

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

John J. Kirby,

Plaintiff,

-vs-

Board on Judicial Standards for the State of Minnesota, its members - Thomas R. Bredeson, Hon. Wayne Farnberg, James J. Schumacher, Hon. Hyam Segell, Gerald C. Stoppel, Janna Merrick, Raul Salazar, Hon. Roberta K. Levy, Hy Applebaum, Hon. Ann Montgomery, its Executive Secretary, George J. Kurvers and its lawyers and agents, Theodore J. Collins, John R. Shultz and John J. Knutson,

Defendants.

Case No. _____

VERIFIED COMPLAINT

JURY TRIAL DEMANDED

INTRODUCTION

Plaintiff, John J. Kirby, served as a Ramsey County Judge for twentyone (21) years when he was defeated for re-election as the result of illegal conduct on the part of members of the Board on Judicial Standards for the State of Minnesota and their agents.

Beginning in June of 1983, the Board began issuing subpoenas requiring various people to appear at the law office of the attorney for the Board or in some cases, to appear at the office of the Executive Secretary of the Board. These subpoenas made allegations that Judge Kirby's dispositions of cases were in violation of the law. The first that the Judge knew that these subpoenas were being served was when a newspaper reporter showed him one.

On Sept. 1, 1983, the Board served Judge Kirby with a Statement of Allegations alleging that he was disposing of driving under the influence and certain other cases in a manner that violated the laws of this State. These allegations were answered in writing and documented by material already in the possession of the Board that showed that the Judge had been acting properly. A written request was made to dismiss these and other charges or provide specific facts that formed the base for the charges.

The Chairman of the Board responded in writing, stating that specifics would be provided or the "charges will be abandoned."

On October 28th, 1983, the Board issued a formal Complaint realleging the charges in the original Statement of Allegations and adding new charges. This deprived Judge Kirby of his right to respond and was contrary to the Board's own rules of procedure. The Board made no showing "of fraud, corrupt motive or bad faith" which is a strict requirement for bringing an action of this nature.

A number of Motions were made to the Board requesting that the action be dismissed on the grounds that the Judge's right to due process under the Constitution had been violated, but the Motions were denied. A Motion was made to remove the Board's attorney because of a direct conflict of interest and to remove one of the members of the Board on the grounds of prejudice, but these Motions were also denied.

Judge Kirby was required to go to trial without the rights afforded him under the due process clause of the United States Constitution.

The whole purpose of the proceeding as publicly implied by the Chairman of the Board was to bring about the election defeat of Judge John J. Kirby, whose particularized Complaint follows this Introduction.

Jurisdiction

1.

This action is brought pursuant to 42 U.S.C. Secs. 1981, 1983, 1985, 1986 and the Constitution of the United States and the amendments thereto. Jurisdiction is founded upon 28 U.S.C. 81331 and the aforementioned statutory and constitutional provisions. Plaintiff further invokes the pendent jurisdiction of this Court to hear and decide claims arising under state law.

2.

The amount in controversy exceeds Ten Thousand and 00/100 ($10,000.00) Dollars, excluding interest and costs.

Parties

3.

Plaintiff, John J. Kirby, is and at all times relevant to this Complaint, a citizen of the United States and a resident of the State of Minnesota, and for twenty-one (21) years was an elected Judge of the State Court of Minnesota, but does not now hold the position because of the activities of the defendants named herein. The defendants, as above stated, are believed to be citizens of the United States and residents of the State of Minnesota, and at all times relevant to this Complaint, subject to the jurisdiction of this Court.

4.

The above named defendant Board Members were at all times relevant to this Complaint, members of the Board on Judicial Standards (hereinafter called the "Board"), and are being sued individually and in their official capacity as members of the Board.

5.

Defendants, Theodore J. Collins, John R. Shultz and John J. Knutson, at all times relevant to this Complaint were acting as attorneys or law clerks for the Board and are being sued individually and in their official capacity in relation to the Board.

6.

Defendant, George J. Kurvers, at all times relevant to this Complaint was acting as Executive Secretary to the Board and is being sued individually and in his official capacity in relation to the Board.

7.

At all times relevant to this Complaint, the defendants in all their actions were acting under color of law and under color of authority as members of the Board, or by authority conferred directly or impliedly by the Board.

COUNT ONE

Due Process

8.

Plaintiff alleges that, during the time relevant to this Complaint, defendants

violated and completely disregarding its own rules and rules of law, thus depriving plaintiff of his right to due process of law in that particularly, but not limited to, the following:

(A) The Board failed to provide plaintiff with the specific facts that formed the basis of the alleged violations he was called upon to answer, to-wit:

(1) On or about September 1, 1983, the Board served the plaintiff with a Statement of Allegations alleging that the plaintiff had conducted himself in a manner prejudicial to the administration of justice and had brought the judicial office and the judicial system into disrepute. Paragraphs V through IX of the Statement of Allegations alleged five (5) incidents of "misconduct" by plaintiff.

(2) On September 9, 1983, plaintiff, through counsel, made a Motion to dismiss the proceedings against him for lack of probable cause and in the alternative, he requested that the allegations against him contained in Paragraphs VIII and IX be stated with more clarity and particularity.

(3) On September 21, 1983, plaintiff received a letter from James J. Schumacher, Chairman of the Board, in which Schumacher informed plaintiff that specific facts as to the allegations in Paragraphs VIII and IX of the Statement of Allegations would be furnished prior to the Board's work under Rule 8 or that the charges would be abandoned.

(4) At no time after September 21, up until October 3, 1983 did plaintiff receive a statement with specific facts with respect to the two (2) allegations of misconduct contained in Paragraphs VIII and IX of the Statement of Allegations.

(5) On October 3, 1983, plaintiff submitted a detailed Answer to the Board and denied any improper jucidial conduct as to Paragraphs I through VII only of the Statement of Allegations.

(6) On October 28, 1983, a formal Complaint was issued by the Board entitled "Inquiry Concerning the Honorable John J. Kirby", which alleges instances of misconduct not addressed in the informal Statement of Allegations. The formal Complaint contained allegations similar to those contained in Paragraphs VIII and IX of the Statement of Allegations, despite the fact that plaintiff had been informed that those allegations had been abandoned.

(7) Defendants Board and Board Members, under color of law denied plaintiff due process of the law when the allegations contained in the formal Complaint differed from those allegations made in the informal Statement of Allegations, and denied plaintiff an **opportunity to respond** in a confidential proceedings as provided for in the Board's own rules, (B.J.S. Rule 8) to all allegations made against him in violation of plaintiff's Fourteenth (14th) Amendment due process rights and 42 U.S.C. Sec. 1983.

(B) The defendants breached the Board's own rules of confidentiality to plaintiff's considerable detriment and damage, to-wit:

(1) Without notice to plaintiff, on or about June 1, 1983, defendant George J. Kurvers caused to be issued a subpoena to Edward Starr, St. Paul City Attorney, commanding Starr to appear at the office of the Board, 200 Minnesota State Bank Building, 200 South Robert Street, on June 1st, 1983 and to bring documents relative to judicial matters handled by the plaintiff.

(2) Without notice to plaintiff, on or about September 12, 1983, defendant John R. Knutson, law clerk, Collins, Buckley, Sauntry & Haugh, acting on behalf of the defendants, Theodore J. Collins, George J. Kurvers, the Board and Board Members, served a subpoena upon Thomas J. Weyandt, St. Paul City Attorney, commanding Weyandt's appearance at the law office of Collins, Buckley, Sauntry & Haugh on September 12, 1983, to give testimony on behalf of the Board.

(3) Without notice to plaintiff, on or about September 15, 1983, defendant John R. Knutson, law clerk, Collins, Buckley, Sauntry & Haugh, acting on behalf of the defendants, Theodore J. Collins, George J. Kurvers, the Board and Board Members, served a subpoena upon Dianne Ward, Assistant St. Paul City Attorney, commanding Ward to appear at the offices of Collins, Buckley, Sauntry & Haugh to give testimony on behalf of the Board.

(4) Without notice to plaintiff, on or about September 16, 1983, defendant John J. Knutson, law clerk, Collins, Buckley, Sauntry & Haugh, acting on behalf of the defendants, Theodore J. Collins, George J. Kurvers, the Board and Board Members, served a subpoena upon Robert Mullen, proprietor of the Moon Saloon, located at 374 St. Peter Street, St. Paul, Minnesota, commanding Mullen to appear at the law offices of Collins, Buckley, Sauntry & Haugh on September 16, 1983 to give testimony on behalf of the Board.

(5) Without notice to plaintiff, on or about September 19, 1983, defendant John R. Knutson, acting on behalf of the defendants, Theodore J. Collins, George J. Kurvers, the Board and Board members, served a subpoena upon Edward Starr, St Paul City Attorney, commanding Starr to appear at the office of the Board

on September 30th, 1983, and to produce documents.

(6) Without notice to plaintiff, on or about October 27, 1983, defendant John R. Knutson, acting on behalf of the defendants, Theodore J. Collins, George J. Kurvers, the Board and Board Members, served a subpoena on Ronald Bushinski, Ramsey County Municipal Court Administrator, commanding Bushinski to appear at the office of the Board to testify on behalf of the Board and to bring requested documents with him.

(7) Defendants by secretly issuing subpoenas thus preventing plaintiff an opportunity to have them quashed, abused the legal process and demonstrated by their actions as described in 1 through 6 a manifest intent to conspire against plaintiff in violation of plaintiff's constitutional rights and 42 U.S.C. Sec. 1983 and 1985. By issuing and serving subpoenas commanding testimony and production of documents at the law offices of Collins, Buckley, Sauntry & Haugh and the office of the Board, the defendants without any legal authority to do so, acted in bad faith, with deliberate indifference to plaintiff's entitlement to due process and outside the scope of authority granted to them.

(8) By issuing subpoenas to various persons prior to the time plaintiff had a right to respond to the informal allegations contained in the Statement of Allegations in a confidential setting, defendants George J. Kurvers, Theodore J. Collins, the Boad and Board members and those acting on their behalf, including John R. Knutson, deliberately violated the rules of the Board by making public the nature of the investigation regarding plaintiff prior to a time when he had an opportunity to respond in a confidential proceeding to the allegations of judical misconduct made against him. Defendants

acted outside the scope of their authority and violated plaintiff's Fourteenth Amendment due process rights and 42 U.S.C. Sec. 1983.

(C) The Board failed to prepare and promulgate guidelines for the determination of the existence of sufficiency of evidence for probable cause, to-wit:

(1) Rule 6(c)(2) of the Rules of the Board on Judicial Standards provides that the Board shall act "under guidelines prepared by the Board" to determine whether or not probable cause exists to proceed to a formal Complaint under Rule 8.

(2) At no time has the Board promulgated guidelines for establishing probable cause to proceed to the formal Complaint; Board rules were adopted 5 July, 1978.

(3) Contrary to its own rules, the Board, by its Executive Secretary, George J. Kurvers, issued a formal Complaint against John J. Kirby and by so doing acted in bad faith, and in deliberate indifference and in reckless disregard of the plaintiff's Fourteenth (14th) Amendment due process rights and 42 U.S.C. Sec 1983. Defendants' intentional conduct was grossly negligent and shocks the conscience of the community and should not be condoned by the Court.

(D) The failure of Board member, Honorable Hyam Segell, to recuse himself or to be removed from hearing and considering the matter, despite the fact that plaintiff had reason to believe that the Honorable Hyam Segell and/or other defendants breached the confidentiality as required of Board members, and made statements to persons not members of the Board, revealing the activities of the Board and the accusations about plaintiff that were unfounded and not true.

(E) The Board failed to remove Theodore J. Collins and/or Collins failed to

remove himself from the prosecution of the case as he was required to do, since earlier Mr. Collins has represented the plaintiff's wife in a marriage dissolution proceedings and was privy to information privileged as to his former client and invoked in writing, to-wit:

(1) On October 26, 1983, plaintiff through counsel, served upon James Schumacher, Theodore J. Collins and George J. Kurvers, a Petition to Remove Theodore J. Collins as Prosecutor and Memorandum in Support of Petition to Remove. Plaintiff asserted that Theodore J. Collins must be removed as Prosecutor based upon the fact that he had a conflict of interest and will be biased in the proceedings against plaintiff, because Theodore J. Collins represented Janice V. Kirby, plaintiff's wife, in a dissolution proceedings against the plaintiff.

(2) Janice V. Kirby also served on the Board an Affidavit stating her concern and invoking her attorney client privilege, confidentiality and right to non-disclosure of secrets.

(3) On November 18, 1983, plaintiff appeared with counsel at a meeting of the Board and moved the Board to dismiss the proceeding against plaintiff based on the constitutional infirmities in the proceedings to date against plaintiff. No action was taken by the Board in response to plaintiff's Motion to Remove Theodore J. Collins as Prosecutor, but the Board referred the matter to the Honorable Bruce C. Stone, Referee.

(4) On December 2, 1983, plaintiff moved the Honorable Bruce C. Stone to remove Theodore J. Collins as the Prosecutor in the matter pending against the plaintiff, and in the alternative, to make a

recommendation to the Board that Theodore J. Collins be removed as the Prosecutor based on conflicts of interest and bias on the part of Theodore J. Collins. On December 2, 1983, plaintiff, through counsel, was heard on his Motion to Remove Theodore J. Collins as Prosecutor.

(5) In Findings issued by the Referee, the Honorable Bruce C. Stone, on december 6, 1983, the Referee in Finding VI stated that "Prior participation as opposing advocate to the Judge in a dissolution proceeding does not, per se, disqualify an attorney from representing the Board in a judicial conduct proceeding." (This Finding is contrary to fact as evidenced by Janice V. Kirby's Affidavit.) This was the result of misleading statements by Theodore J. Collins (see transcript of hearing).

(6) Theodore J. Collins refused to remove himself as Prosecutor in the matter against John J. Kirby, and the Board and Board Members refused to remove Theodore J. Collins as the Prosecutor in this matter.

(7) By their actions, defendants Theodore J. Collins, the Board and Board members have acted intentionally in bad faith and in deliberate disregard of the plaintiff's entitlement to due process, and fundamental fairness in a proceeding which threatened to deprive plaintiff of his livelihood, in violation of the Fourteenth (14th) Amendment, which are actions in violations of 42 U.S.C. Secs. 1983, 1985 and 1986.

(8) That as a result of defendants' actions and maltreatment of plaintiff, as specified in the foregoing, plaintiff has been caused to suffer

great annoyance, humiliation and mental suffering to his damage in the sum of over Fifty Thousand and 00/100 ($50,000.00) Dollars.

(G) The defendants fabricated and used falsly written statements alleged to have been made by persons interviewed in the course of the investigation, including but not limited, to-wit: Fabricated statement of Peter Archer, Assignment Clerk, Ramsey County, Minnesota Court, stating that he made statements to the Executive Secretary regarding plaintiff's continued intemperance while functioning as a Judge in said Court; and the statements of Marjorie Suggs, Senior Clerk, Maplewood Division of said Court, making reference to statements that plaintiff had made in Court and to Marjorie Suggs regarding plaintiff's conduct and punctuality.

(H) The Board failed to abide by its own rules when it investigated the plaintiff's legal interpretation and judgments properly made in his role as a Judge, knowing full well that such investigation was strictly forbidden by its own rules, to-wit:

> "Proceedings Not Substitute for Appeal. In the absence of fraud, corrupt motive, or bad faith, the Board shall not take action against a Judge for making Findings of Fact, reaching a legal conclusion, or applying the law as he understands it. Claims of error shall be left to the appellate process." Rule 4(b) BJS, 3.4 ABA Std.

(I) The defendants violated plaintiff's rights by publicly implying, through its Chairman, that the Board's purposes were to bring about election defeats regardless of the final outcome of its cases. In a speach given by James Schumacher, Chairman of the Board, in the Lutheran Brotherhood Building, he stated that it was the position of the Board that every time the Board had come public with the prosecution of a Judge, he was not re-elected, except in one instance alone, and that it didn't matter what disposition the Supreme Court made of the case, the publicity was enough. In the

hallway of the Lutheran Brotherhood Building, in a conversation with plaintiff, the Chairman stated that the Board had, the previous day, recommended plaintiff's removal from the bench, and when questioned about this, James Schumacher stated to plaintiff "It doesn't matter, you won't be re-elected."

COUNT TWO

Outside Scope of Authority

9.

The allegations set forth in Paragraphs 1 through 8 inclusive are incorporated herein as if fully set forth and plaintiff further alleges that the Board and its members and agents, individually and deliberately acted outside of the scope of their authority by particularly, but not limited to, the following:

(A) Deceptively using its subpoena power in a secretive and unlawful manner so as to prevent plaintiff's knowledge of the issuance of any subpoenas for the purpose of preventing plaintiff an opportunity to make a Motion to quash.

(B) Deliberately investigating and prosecuting plaintiff for legal disposition of cases, knowing that such was forbidden by its own rules and with full knowledge that the decisions were in fact in compliance with the law.

(C) Authorizing and encouraging the fabrication of falsly written statements solely for the purpose of taking action against the plaintiff.

(D) Deceiving the plaintiff by leading him to believe that certain allegations would be abandoned, thus preventing a confidential response before publication.

(E) Conducting an investigation and prosecution of plaintiff, not for the

purposes set out in its own rules, but for the purpose of creating unfavorable publicity that would malign plaintiff to the point that he could not be re-elected.

(F) Breaching its own rules of confidentiality by deliberately leaking privileged information to the media.

(G) Publicly implying, through its Chairman, that the Board's purposes were to bring about an election defeat regardless of the final outcome of its cases.

COUNT THREE

Conspiracy

10.

The allegations set forth in Paragraphs 1 through 9 inclusive are incorporated herein as if fully set forth and plaintiff further alleges that the Board and its members and agents individually manifested their intent to conspire against plaintiff in violation of plaintiff's constitutional rights as set out in 42 U.S.C. Sec. 1985 and related statutes by particularly, but not limited to, the following:

(A) After being fully informed that a charge of mishandling cases was completely without foundation, discussed among themselves the desirability of going forward, and did go forward, with groundless charges for the purpose of discrediting plaintiff through the damaging publicity such charges would invoke; deliberately characterizing plaintiff's judicial decisions regarding defendants' drivers licenses (through the assistance of the Wilder Foundation) as driving under the influence cases, knowing full well that the program was not designed to handle alcohol related offenses nor was it ever used to handle alcohol related offenses. The purpose of the Board's action was for the publicity that this would create, giving the

inference that the plaintiff as a Judge was a heavy drinker and was dismissing alcohol related offenses. The whole procedure used to dispose of the subject cases was completely known to the Board and explained orally by the Court Administrator and his staff and again in the written Answer to the confidential Complaint. Judicial members of the Board were familiar with the way plaintiff handled these cases and also used the same or similar procedures.

(B) Acted collectively and among themselves in a conspiratorial manner to prevent plaintiff from answering allegations in a confidential setting as prescribed by the Board's own rules, and particularly by deceiving and misleading plaintiff into believing that certain allegations would be particularized or abandoned so that plaintiff could respond in a confidential setting.

(C) Recommending the maximum penalty against plaintiff, knowing full well that it would not be affirmed by the Supreme Court and was contrary to the evidence and the record, but that it would do the most damage to the plaintiff's reputation, and then stating publicly in effect that the inevitable consequence was to bring on the electoral defeat of plaintiff.

11

That as a result of defendants' actions and maltreatment of plaintiff, as stated in the aforesaid counts, plaintiff has been caused to suffer loss of wages and pension benefits to his damage in an amount in excess of Seven Hundred Fifteen Thousand and 00/100 ($715,000.00) Dollars.

WHEREFORE, plaintiff seeks judgment against each and every defendant, jointly and severally as follows:

1. Compensatory damages in an amount in excess of Fifty Thousand and 00/100 ($50,000.00) Dollars.

2. Punitive damages in an amount in excess of Fifty Thousand and 00/100 ($50,000.00) Dollars to be determined based upon the bad faith and malicious conduct on the part of the defendants.

3. That the plaintiff be awarded attorney's fees pursuant to 42 U.S.C. Sec. 1988, and such other relief as the Court deems proper.

Douglas W. Thomson
Attorney for Plaintiff
#1530 - 55 E. Fifth Street
St. Paul, Minnesota 55101
(612) 227-0856

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

PLAINTIFF'S VERIFICATION

John J. Kirby, being duly sworn, says that he is the plaintiff in the above entitled action; that he has read the foregoing Verified Complaint and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes them to be true.

John J. Kirby

Subscribed and sworn to before me
this 6th day of June, 1985.

Notary Public

[illegible] NOTARY PUBLIC-MINNESOTA
My Commission Expires JULY 14, 1989

THOMSON & HAWKINS
SUITE 1530
55 EAST FIFTH STREET
ST. PAUL, MINNESOTA 55101
(612) 227-0856

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF DAKOTA — FIRST JUDICIAL DISTRICT

John J. Kirby,

Plaintiff,

vs.

Board on Judicial Standards,
George J. Kurvers,
Thomas R. Bredeson,
Hon. Wayne Farnberg
James J. Schumacher
Hon. Hyam Segell
Gerald C. Stoppel
Janna Merrick,
Raul Salazar
In their capacity as members
of the Board on Judicial
Standards, Theodore J. Collins,
John R. Schulz, John J. Knutson

Defendants.

VERIFIED COMPLAINT

Plaintiff for his cause of action against defendants alleges as follows:

COUNT 1

1.

Plaintiff's cause of action is made pursuant to Title 42 U.S.C. §§1983, 1985, 1986 and 1988 and seeks recovery of compensatory and punitive damages against defendants who under color of state law have deprived plaintiff of due process under the constitutions of the United States and the State of Minnesota

by conspiring to prevent plaintiff from holding office of Municipal Court judge in a proceeding which hinders and impedes plaintiff in the discharge of his duties and threatens to deprive the plaintiff of his livelihood. Plaintiff further seeks declaratory judgment and a finding that the defendants actions which violate plaintiff's fourteenth amendment rights are unconstitutional. This Court has jurisdiction over plaintiff's causes of action stated herein.

2.

Plaintiff John J. Kirby is a judge in Ramsey County Municipal Court, State of Minnesota.

3.

Defendant Minnesota Board on Judicial Standards hereinafter (Board) is a panel whose members are appointed by the governor of the state. The Board's function is to receive information, allegations and complaints regarding members of the state's judiciary and to take action upon those complaints according to the Rules of Board on Judicial Standards adopted July 5, 1978.

4.

George J. Kurvers, Gene W. Halverson, John H. Allers, Hy Applebaum, Hon. Wayne Farnberg, James J. Schumacher, Hon. Hyam Segell, Gerald C. Stoppel, and John J. Knutson are members of the Board on Judicial Standards (hereinafter Board members).

5.

Theodore J. Collins is an attorney licensed to practice in the State of Minnesota and was appointed by the Board on Judicial Standards to prosecute the matter of the Inquiry Concerning the Honorable John J. Kirby, File No. 82-20 of the Board on Judicial Standards.

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6.

Plaintiff sues each and every defendant in both his or her individual and official capacity.

7.

On or about September 1, 1983, the Board served the plaintiff with a Statement of Allegations alleging that the plaintiff has conducted himself in a manner prejudicial to the administration of justice and has brought the judicial office and the judicial system into disrepute. Paragraphs V through IX of the Statement of Allegations alleged five incidents of "misconduct" by plaintiff (see Atttachment 1).

8.

On September 9, 1983, plaintiff, through counsel, made a motion to dismiss the proceedings against him for lack of probable cause and in the alternative he requested that the allegations against him contained in paragraphs VIII and IX be stated with more clarity and particularity.

9.

On September 21, 1983, plaintiff received a letter from James J. Schumacher, Chairman of the Board, in which Schumacher informed plaintiff that specific facts as to the allegations in paragraphs 8 and 9 of the Statement of Allegations would be furnished prior to the Board's work under Rule 8 or that the charges would be abandoned.

10.

At no time after September 21, up until October 3, 1983 did plaintiff receive a statement with specific facts with respect to the two allegations of misconduct contained in paragraphs VIII and IX of the Statements of Allegations.

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11.

On October 3, 1983, plaintiff submitted a detailed answer to the Board and denied any improper judicial conduct as to paragraphs I through VIII only of the Statement of Allegations (see Attachment 2).

12.

On October 28, 1983 a formal complaint was issued by the Board entitled Inquiry Concerning the Honorable John J. Kirby which alleges instances of misconduct not addressed in the informal Statement of Allegations. The formal complaint contained allegations similar to those contained in parargaphs VIII and IX of the Statement of Allegations desipte the fact that plaintiff had been informed that those allegations had been abandoned (see Attachment 3).

13.

Defendants Board and Board members under color of law denied plaintiff due process of the law when the allegations contained in the formal complaint differed from those allegations made in the informal Statement of Allegations and denied plaintiff an opportunity to respond in a confidential proceedings as provided for in the Board's own rules to all all allegations made against him in violation of plaintiff's fourteenth amendment due process rights and 42 U.S.C. §1983.

14.

Defendant Board and Board members under color of law denied plaintiff due process of law when they denied him an opportunity to respond informally to the allegations contained in paragraphs VIII and IX of the Statement of Allegations before issuing a formal complaint on those charges in volation of plaintiff's fourteenth amendment due process rights and 42 U.S.C. §1983.

COUNT II

15.

Plaintiff realleges paragraphs 1 through 12.

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15.

On or about June 1, 1983, defendant George J. Kurvers caused to be issued a subpoena to Edward Starr, St. Paul City Attorney commanding Starr to appear at the office of the Board, 202 Minnesota State Bank Building, 200 South Robert Street, on June 1, 1983 and to bring documents relative to judicial matters handled by the plaintiff.

17.

On or about September 12, 1983, defendant John R. Knutson, law clerk, Collins, Buckley, Sauntry & Haugh, acting on behalf of the defendants Theordore J. Collins, George J. Kurvers, the Board and Board members, served a subpoena upon Thomas J. Weyant, St. Paul City Attorney, commanding Weyant's appearance at the law office of Collins, Buckley, Sauntry & Haugh on September 12, 1983 to give testimony on behalf of the Board.

18.

On or about September 15, 1983, defendant John R. Knutson, law clerk, Collins, Buckley, Sauntry & Haugh, acting on behalf of the defendants Theordore J. Collins, George J. Kurvers, the Board and Board members, served a subpoena upon Dianne Ward, Assistant St. Paul City Attorney, commanding Ward to appear at the offices of Collins, Buckley, Sauntry & Haugh to give testimony on behalf of the Board.

19.

On or about September 16, 1983, defendant John J. Knutson, law clerk, Collins, Buckley, Sauntry & Haugh, acting on behalf of the defendants Theordore J. Collins, George J. Kurvers, the Board and Board members, served a subpoena upon Robert Mullen, proprietor of the Moon Saloon located at 374 St. Peter Street, St. Paul, Minnesota, commanding Mullen to appear at the law office of Collins,

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Buckley, Sauntry & Haugh on September 16, 1983 to give testimony on behalf of the Board.

20.

On or about September 19, 1983, defendant John R. Knutson, acting on behalf of the defendants Theordore J. Collins, George J. Kurvers, the Board and Board members, served a subpoena upon Edward Starr, St. Paul City Attorney, commanding Starr to appear at the office of the Board on September 20, 1983 to give testimony on behalf of plaintiff and to produce documents.

21.

On or about October 27, 1983, defendant John R. Knutson, acting on behalf of the defendants Theordore J. Collins, George J. Kurvers, the Board and Board members, served a subpoena on Ron Bushinski, Ramsey County Municipal Court Adminster, commanding Bushinski to appear at the office of the Board to testify on behalf of the Board and to bring requested documents with him.

22.

Defendants by issuing their actions described in paragraphs 16 through 21 manifested their intent to conspire against plaintiff in violation of platiniff's constitutional rights and 42 U.S.C. §1985. By issuing and serving subponeas commanding testimony and production of documents at the law office of Collins, Buckley, Sauntry & Haugh and the office of the Board acted in bad faith, with deliberate indifference to plaintiff's entitlement to due process and outside the scope of authority granted to them.

COUNT III

23.

Plaintiff realleges paragraphs 1 through 12 and 16 through 21.

24.

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24.

By issuing subpoenas to various persons prior to the time plaintiff responded to the informal allegations contained in the Statement of Allegations, defendants George J. Kurvers, Theodore J. Collins, the Board and Board members and those acting on their behalf, including John R. Knutson violated the rules of the Board by making public with the nature of the investigation regarding plaintiff prior to a time when he had an opportunity to respond in a confidential proceeding to the allegations of judicial misconduct made against him. Defendants acted outside the scope of their authority and violated plaintiff's fourteenth amendment due process rights and 42 U.S.C. §1983.

COUNT IV.

25.

Plaintiff realleges paragraphs 1 through 12 and 16 through 22.

26.

Rule 6(c)(2) of the Rule of the Board on Judicial Standards provides that the Board shall act "under guidelines prepared by the Board" to determine whether or not probable cause exists to proceed to a formal complaint under Rule 8.

27.

At no time has the Board promulgated guidelines for establishing probable cause to proceed to the formal complaint.

28.

Contrary to its own rules, the Board by its executive secretary, George J. Kurvers, issued a formal complaint against John J. Kirby and by doing acted in bad faith, and in deliberate indifference and in wreckless disregard of the plaintiff's fourteenth amendment due process rights and 42 U.S.C. §1983. Defendants intentional conduct was grossly negligent and shocks the conscience of the community and should not be condoned by the court.

COUNT V.

29.

Plaintiff realleges paragraphs 1 through 12 and 16 through 21.

30.

On October 26, 1983, plaintiff through cunsel served upon James Schumacher, Theodore J. Collins and George Kurvers a Petition to Remove Theodore J. Collins as Prosecutor and Memorandum In support of Petition to Remove. Plaintiff asserted that Theodore J. Collins must be removed as prosecutor based upon the fact that he has a conflict of interest and will be biased in the proceedings against plaintiff because Theodore J. Collins represented Janice V. Kirby, plaintiff's wife in a hotly contested dissolution proceeding against the plaintiff.

31.

On November 18, 1983, plaintiff appeared with counsel at a meeting of the Board and moved the Board to dismiss the proceeding against plaintiff based on the constitutional infirmities in the proceedings to date against plaintiff. No action was taken by the Board in response to plaintiff's motion to remove Theodore J. Collins as prosecutor but referred the matter was to the Honorable Bruce C. Stone, referee.

32.

On December 2, 1983, plaintiff moved the Honorable Bruce C. Stone to remove Theodore J. Collins as the prosecutor in the matter pending against the plaintiff, and in the alternative, to make a recommendation to the Board that Theodore J. Collins be removed as the prosecutor based on conflicts of interest and bias on the part of Theodore J. Collins. On December 2, 1983, planitiff, through counsel was heard on his motion to remove Theodore J. Collins as prosecutor.

33.

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In findings issued by the referee, the Honorable Bruce C. Stone on December 6, 1983, the referee, in finding VI, stated that "Prior participation as opposing advocate to the Judge in a dissolution proceeding does not, per se, disqualify an attorney from representing the Board in a judicial conduct proceeding."

34.

To date, Theodore J. Collins has refused to remove himself as prosecutor in the matter pending against John J. Kirby, and the Board and Board have refused to remove Theodore J. Collins as the prosecutor in this matter.

35.

By their actions, defendants Theodore J. Collins, the Board, and Board members, have acted intentionally in bad faith and in deliberate disregard of the plaintiff's entitlement to due process, and fundamental fairness in a proceeding which threatens to deprive plaintiff of his livelihood, in violation of the fourteenth amendment which are actions in violation of 42 U.S.C. §§1983, 1985, and 1986.

36.

That as a result of defendants actions and maltreatment of plaintiff, as specified in Counts I through V,plaintiff has been caused to suffer great annoyance, humiliation, and mental suffering to his damage in the sum of over $50,000.00.

WHEREFORE, Plaintiff seeks the following judgment against each and every defendant, jointly and severally as follows:

1. Compensatory damages in an amount in excess of $50,000.00.

2. Punitive damages in an amount in excess of $50,000.00 to be determined based upon the bad faith intentionally and malicious conduct on the part of defendants.

3. That the court enter a declaratory judgment declaring that the action commenced by the defendants against the Honorable John J. Kirby in the matter of the Inquiry Concerning the Honorable John J. Kirby, file no. 82-20 be dismissed

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with prejudice because of the constitutional defects in the proceedings to date which defects cannot be remedied without further damage to the constitutionally protected rights of the plaintiff.

4. That the plaintiff be awarded attorneys' fees pursuant to 42 U.S.C. §1988, and such other relief as the court may deem proper.

THOMSON & HAWKINS

By _____
DOUGLAS W. THOMSON
Suite 1530
55 East Fifth Street
St. Paul, Minnesota 55101
(612) 227-0856

Attorneys for Plaintiff

VERIFICATION BY PARTY

STATE OF MINNESOTA)
)ss
COUNTY OF RAMSEY)

John J. Kirby, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing verified complaint and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated on information and bleief, and as to those matters he believes to be true.

_____
John J. Kirby

Subscribed and sworn to before me this ___ day of _____. 1983.

_____
Notary Pubic

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PUBLIC HEARING TO CONSIDER CERTAIN RULES

OF THE BOARD ON JUDICIAL STANDARDS

Supreme Court No: C4-85-697

Date of Hearing: March 14, 1986
11:00 a.m.
Supreme Court Chambers

Name	Date Written Summary filed	Request Oral Presentation Yes	No
~~Rodger's Adams~~, Mpls. Star & Tribune	1-8-86	X	
Hon Hyam Segell	2-6-86	will not X attend	
Theodore J. Collins	2-21-86	X	
Michael J. Hoover	3-6-86	X	
Robert M. Shaw	3-7-86		X
Hon Godfrey (pursuant to DKA)			

March 13, 1986

MEMORANDUM

TO: MEMBERS OF THE COURT REVISED

FROM: C. M. JOHNSON

RE: **Hearing re: Board on Judicial Standards Friday, 14 March 1986 11:00 a.m.**

The following individuals have filed written summaries on their positions. In the order of filing dates, those who wish to present an oral statement are as follows:

1. Judge Otis H. Godfrey
2. Patricia Hirl — Minneapolis Star & Tribune
3. Theodore J. Collins
4. Michael J. Hoover

In addition, Robert M. Shaw has filed a written statement but does not intend to make an oral presentation. It is suggested that the individuals speak in the order of the filing. No time limits have been designated for the presentation.

dlw

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dlw