STATE OF MINNESOTA

IN SUPREME COURT

C9-81-1206

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO RULES FOR REGISTRATION OF ATTORNEYS

IT IS HEREBY ORDERED that a hearing be had before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on November 9, 1990, at 9:00 a.m., to consider the petitions of the Minnesota Client Security Board and the Minnesota State Bar Association to amend Rule 2, Rules of the Supreme Court for Registration Attorneys, concerning the levying of a fee for the Minnesota Client Security Fund. Copies of the petitions are annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 245 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before November 5, 1990, and
2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before November 5, 1990.

Dated: September 20, 1990

BY THE COURT:

Peter S. Popovich
Chief Justice

FILE NO. C9-81-1206

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition of the Minnesota Client Security Board for Amendment of Rules Relating to Registration of Attorneys.

PETITION

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TO: THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Minnesota Client Security Board hereby petitions the Court to adopt, effective with payments due on and after July 1, 1991, the following amendments to Rule 2, Rules for Registration of Attorneys:

RULE 2. REGISTRATION FEE

In order to defray the expenses of examinations and investigations for admission to the bar and disciplinary proceedings, over and above the amount paid by applicants for such admission, with exception hereinafter enumerated, each attorney admitted to practice law in this state and those members of the judiciary who are required to be admitted to practice as a prerequisite to holding office shall hereafter annually pay to the clerk of the appellate courts a registration fee in the sum of One Hundred ~~Two Dollars ($102.00)~~ Twenty-seven Dollars ($127.00) or in such lesser sum as the court may annually hereafter determine.

Such fee, or a portion thereof, shall be paid on or before the first day of January, April, July, or

October of each year as requested by the clerk of the appellate courts.

All sums so received shall be allocated as follows:

$15.00 to the State Board of Law Examiners

$7.00 to the State Board of Continuing Legal Education

$80.00 to the Lawyers Professional Responsibility Board

$25.00 to the Minnesota Client Security Fund.

The following attorneys and judges shall pay an annual registration fee of Thirty-nine Dollars ($39.00):

(a) Any attorney or judge whose permanent residence is outside the State of Minnesota and who does not practice law within this state;

(b) Any attorney who has not been admitted to practice for more than three years;

(c) Any attorney while on duty in the armed forces of the United States.

The Thirty-nine Dollars ($39.00) so received shall be allocated as follows:

$15.00 to the State Board of Law Examiners

$7.00 to the State Board of Continuing Legal Education

$17.00 to the Lawyers Professional Responsibility Board.

Any attorney admitted to practice law on or after July 1, 1988, shall pay to the Minnesota Client Security Fund $50 in the fiscal year of admission and an additional $50 in the fiscal year the attorney becomes subject to the first paragraph of this rule. This second $50 shall be instead of any annual assessment in favor of the Client Security Fund in that year.

Any attorney who is retired from any gainful employment or permanently disabled, or who files annually with the clerk of the appellate courts an affidavit that he or she is so retired or disabled and not engaged in the practice of law, shall be placed in a fee-exempt category and shall remain in good standing. An attorney claiming retired or permanently disabled status who subsequently resumes active practice of law shall promptly file notice of such change of status with the clerk of the appellate courts and pay the annual registration fee.

Any judge who is retired from any gainful employment or permanently disabled, who no longer serves on the bench or practices law, and who files annually with the clerk of the appellate courts an affidavit that he or she is so retired or disabled and not engaged in the practice of law, shall be placed in a fee-exempt category and shall remain in good standing.

A judge claiming retired or permanently disabled status who subsequently resumes service on the bench or the active practice of law shall promptly file notice of such change of status with the clerk of the appellate courts and pay the annual registration fee.

Dated: June 6, 1990.

MELVIN I. ORENSTEIN
CHAIRMAN, MINNESOTA CLIENT
SECURITY BOARD
Attorney No. 82764
80 South Eighth Street
Suite 4200
Minneapolis, MN 55402
(612) 371-3211

File No. C0-85-2205
STATE OF MINNESOTA
IN SUPREME COURT

Rules for Registration of Attorneys

PETITION OF THE MINNESOTA STATE BAR ASSOCIATION

Petitioner, Minnesota State Bar Association (MSBA), states:

WHEREAS, the Minnesota Supreme Court has the inherent and exclusive power to administer justice and govern the legal profession, and

WHEREAS, the Minnesota Client Security Board (Board) has filed a petition to amend the Rules for Registration of Attorneys providing for a permanent annual assessment of $25.00 on all attorneys licensed in Minnesota to maintain the balance of the Client Security Fund and to support the necessary work of the Client Security Board, and

WHEREAS, the MSBA has considered the issue of a permanent annual assessment at the meetings of the MSBA Board of Governors on June 28, 1990 and the General Assembly on June 30, 1990, and

WHEREAS, the MSBA strongly supports the work of the Client Security Board and the maintenance of the Client Security Fund, and

WHEREAS, the MSBA Board of Governors and General Assembly voted to amend the Board's petition to provide for a one-year assessment of $50.00 rather than a permanent annual assessment of $25.00, and

WHEREAS, the MSBA believes that periodic assessments provide greater emphasis to the problem of attorney theft by focusing the bar's attention on this issue periodically, and

WHEREAS, the MSBA believes that periodic assessments renew and confirm the bar's voluntary contribution to rectifying lawyer defalcations, and

WHEREAS, the MSBA believes that requests for assessments for the Client Security Fund should be made as the need arises, and

WHEREAS, the MSBA believes that a higher, one-year assessment will be adequate to maintain the administration of the Board, continue payments to victims of dishonesty by attorneys and build reserves sufficient to meet short-term future needs while not overburdening attorney licensing fees.

NOW, THEREFORE, the Minnesota State Bar Association respectfully petitions the Minnesota Supreme Court to accept this Petition to provide for a one-year assessment of $50.00 on attorneys licensed in Minnesota to maintain the balance of the Client Security Fund and to support the work of the Client Security Board.

DATE: July 28, 1990

MINNESOTA STATE BAR ASSOCIATION

BY: Tom Tinkham
Tom Tinkham
President

STATE OF MINNESOTA
IN SUPREME COURT

C9-81-1206
C0-85-2205

OFFICE OF
APPELLATE COURTS

OCT 17 1990

FILED

In re Proposed Amendments to Rules for Registration of Attorneys.

REQUEST BY JAMES W. FORBESS TO MAKE AN ORAL PRESENTATION

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA:

JAMES W. FORBESS, an attorney licensed to practice law in Minnesota, hereby requests an opportunity to make an oral presentation in opposition to the petitions of the Minnesota Client Security Board and the Minnesota State Bar Association and in support of his alternative proposals.

Dated: October 16, 1990.

James W. Forbess

JAMES W. FORBESS
Attorney No. 30806
1025 Hallam Avenue North
Mahtomedi, Minnesota 55115
(612)-426-5393(H)
(612)-227-4200(W)

STATE OF MINNESOTA
IN SUPREME COURT

C9-81-1206
C0-85-2205

In re Proposed Amendments to Rules for Registration of Attorneys.

STATEMENT BY
JAMES W. FORBESS

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA:

SUMMARY OF POSITION:

1. The proposed amendments should not be adopted because:

   a. Attorneys who do not handle client funds ought not be obligated to bear the financial burden of the risk of loss created by those attorneys who do handle client funds. (pp. 5, 9).

   b. The equal assessment on all attorneys has unequal and disparate consequences detrimental to attorneys who do not handle client funds. (pp. 5, 10).

   c. An exemption for retired attorneys, but not for attorneys who do not handle client funds, is arbitrary. (pp. 6-8).

2. The financial stability of the Minnesota Client Security Fund could be assured by use of methods more equitable and fair than those proposed by either the

Minnesota Client Security Board or by the Minnesota Bar Association.

a. Assess only those attorneys who handle client funds. (pp. 9-11).

b. Assess only law firms on a "per attorney" basis. (pp. 11-12).

c. Allocate funds from the Trust Account Board. (pp. 12-14).

3. Preventative measures should be considered after further study. (pp. 14-15).

DISCUSSION:

A. BACKGROUND

In 1987 the Minnesota Client Security Fund was created because the Court was of the view that clients' limited recourse through the Bar Association client security fund was inequitable and unfair to clients and to the Bar Association.[1] It is now just three years after the

1. Four years ago the Minnesota State Bar Association was in serious trouble with its client security fund because of the Sampson and Flanagan affairs. At that time the Court was of the view that it would be prudent to transfer control of the fund to a board responsible to the Court so that the client security fund would be supported financially by all practicing attorneys in Minnesota, not just those in the bar association. This was seen as a fair and equitable solution to the problem which was

inception of the Minnesota Client Security Fund and at this point there is concern that the fund will be depleted if there is no additional cash infusion. This concern appears to be well-founded.[2] However, the low balance in reserve is a clear signal that the problem not only continues unabated, but that the problem has grown beyond the prior expectations of the Court.

Therefore, it is entirely appropriate to consider not only the question of additional funding for the Client Security Fund, but also to consider the more difficult question of how to prevent or minimize the risk of loss.

(continued)

considered to be extraordinary in view of those isolated instances of misappropriation. In addition to what was hoped would be a one-time assessment of $100 on all practicing attorneys, the fund has been receiving not only interest on the $1.4 million corpus of the fund, but it has also been receiving $100 from each newly admitted member of the Minnesota Bar.

2. The Minnesota Client Security Board is projecting that an annual infusion, from sources other than interest and newly admitted attorneys, of approximately $325,000 from assessments is required to make the fund fiscally sound. While I do not wish to address the propriety of any particular amount that the Court determines would be necessary to make the Client Security Fund fiscally sound, I would only mention that 4 years ago, in the original presentation to establish the client security fund, it was anticipated that the fund would be continually drawn down to a minimal level which would then be maintained by the interest and fees from new admittees.

The funding issue is not simply a matter of whether to provide additional capital to the Client Security Fund, but rather how that additional capital should be provided. Just as the Court determined three years ago that a uniform assessment on all attorneys was more fair and equitable than a voluntary assessment on only Bar Association members, now the Court can review additional options under the same standard.

B. OBJECTIONS TO PROPOSALS BY THE MINNESOTA CLIENT SECURITY BOARD AND THE MINNESOTA BAR ASSOCIATION

The Client Security Board has proposed to meet the projected shortfall by creating a permanent assessment of $25 per attorney. The Minnesota Bar Association has proposed to meet the current needs of the fund by having a one-year assessment of $50 per attorney with future assessments to be imposed as deemed necessary by the Court.

While the Board's proposal would gradually build up the capital in the Client Security Fund to a point it considers financially sound over a period of five years, it does not provide for a durational cap on the capital-raising rule it would have the Court impose. There is

something healthy about requiring governmental agencies to periodically demonstrate to the appropriate governmental branch that the agency and its programs are in need of additional funds and that its programs have a proper focus and are properly managed. If the Court were to adopt the Board's proposal, I would urge the Court to place a durational limit on the assessment of not more than 5 years.

While the Bar Association's proposal would require specific authorization for any future assessment, and thus function similarly to a durational cap, the flaw in both proposals of the Board and the Bar Association is that the source of funding under these proposals is neither fair nor equitable with respect to attorneys who do not handle client funds. Attorneys who do not create a risk of loss should not be required to pay for the cost of the risk of loss.[3] Attorneys who create a risk of loss typically have an opportunity to pass the cost of paying for that risk of loss onto their clients, while attorneys who do not handle client funds typically would not be able to avoid personal liability for the cost of the risk of loss.[4] Thus, the

3. See PART C, FIRST PROPOSAL, p. 9, infra..

4. See PART C, FIRST PROPOSAL, p. 10, infra..

proposals have a disparate and detrimental impact on attorneys who do not handle client funds.

A classification is unconstitutional if the distinctions that separate those who are included within the classification from those who are excluded are manifestly arbitrary or fanciful.[5] If there is no natural and reasonable basis for treating similarly situated persons differently, the classification giving rise to the disparate treatment is unconstitutional.[6] Thus, it is not sufficient for the proposed rule to have a legitimate goal and for the makers of the rule to reasonably believe that the rule will promote that purpose. But rather the inquiry is, whether the rule has a legitimate goal and whether the makers of the rule could reasonably believe that the classification will promote that purpose.[7]

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5. Price v. Amdal, 256 N.W.2d 461 (Minn. 1977). See Lund v. Hennepin County, 403 N.W.2d 617 (Minn. 1987).

6. U.S. Const., amend. XIV, § 1; Minn. Const. art. I, § 2. See Price v. Amdal, 256 N.W.2d 461 (Minn. 1977) (decedent's due-care presumption in Minn. Stat. § 602.04 was unconstitutional denial of equal protection; distinction between decedents and survivors was arbitrary).

7. See Imlay v. City of Lake Crystal, 453 N.W.2d 326 (Minn. 1990) (cap on municipal tort liability as provided in Minn. Stat. § 604.02, subd. 1., was not unconstitutional; appellants did not focus on reasonableness of lawmakers' belief). Notwithstanding my reservations about the legitimacy of the goal of the Court to provide a remedy to clients, the protection of clients and the fair allocation of costs of providing that protection does serve a legitimate public purpose. (The broad claim of exclusive jurisdiction over the regulation of the practice of law as enuciated in Sharood v.

The proposed amendments from the Board and the Bar Association would not include any assessment on attorneys who are retired from the practice of law and who are not gainfully employed. Presumably, this exemption is the product of the notion that those attorneys no longer contribute to the risk of loss and therefore ought to be exempt. However, if attorneys are retired from the practice of law, but are otherwise gainfully employed, they too should be exempt since they would not create a risk of loss. Similarly, can those attorneys who do not have clients or who do not handle client funds, be considered to pose any greater risk than exists from attorneys who are retired from the practice of law and not gainfully employed? In fact, attorneys who are exempt under the retired status provision may well derive economic benefits as a direct result of efforts of attorneys who do have access to client funds. These benefits would typically take the form of periodic

(continued)

Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973), may ultimately prove to be counterproductive in this context as well as be facially overbroad as a general matter). However, exempting retired attorneys who may or may not receive income from activities which create a risk of loss for clients while not exempting those attorneys who do not create a risk of loss for clients does not reasonably promote the purpose.

payments under a buy-out arrangement or profit-sharing plan which, of necessity, would require that client funds be placed at risk.

C. PROPOSALS BY JAMES W. FORBESS: OVERVIEW

Lets assume for purposes of discussion, that the Client Security Fund does, indeed, need an annual cash infusion of $325,000 (in addition to interest and revenue from new admittees) in order to be fiscally sound. My proposal would be that the Court adopt one of the following options or a combination thereof:

1. Assess each attorney who actually handles client funds (7,800) an amount to cover the shortfall: $45 (see Exhibit A); or

2. Assess each law firm that handles client funds (1,666) an certain amount ($45 per attorney) per attorney in the law firm to cover the shortfall (see Exhibit B); or

3. Apply all or a portion of funds received under IOLTA to cover the shortfall (see Exhibit C).

FIRST PROPOSAL: ASSESS ONLY THOSE ATTORNEYS WHO HANDLE CLIENT FUNDS

With respect to the first proposal, that attorneys who handle client funds be responsible for any assessments (Exhibit A), it might be argued that all attorneys benefit from protecting clients from misappropriation since without that protection the reputation of attorneys and the integrity of the legal system as a whole would be sullied by the misdeeds of the few. Such an argument misses the undeniable truth that the only losses clients have suffered have come at the hands of those who have handled their funds. There is a risk of loss only because certain attorneys have access to client funds. There is absolutely no risk of loss from attorneys who do not have access to client funds. Therefore, it would be fair and equitable for those who create the risk of loss to bear the burden of funding for that risk of loss.

It might also be argued that there could be reporting difficulties and that accurately identifying those attorneys who actually handle client funds might be administratively difficult. However, any attorney who is subject to IOLTA requirements is independently known to handle client funds and spot checks by the Client Security Board would be able to detect nonreporting.

In addition, most attorneys who do not handle client funds probably do not work in a private law firm and must, of necessity, pay any assessment personally, while those who do handle client funds are employed in private law firms which do have the capability, if not the practice, of passing that cost on to the clients of the firm. Thus, a uniform assessment on all attorneys has a disparate impact, depending on the nature of each attorney's employment. Under this argument in support of the proposal in Exhibit A, I am asking that the Court indulge in the supposition I have embraced, namely, that those who have been empowered by a law firm to have access to client funds have most likely had registration fees, including assessments for the Client Security Fund, paid for by the law firm whether by direct payment or by means of reimbursement. There is nothing equitable nor fair about placing the cost of the risk of loss on those who do not contribute to the risk of loss where those persons must be personally responsible for the payment, while those who create the risk of loss are in a position to pass the cost of loss on to their clients. Even if the Court does not accept my theory regarding who ultimately bears the risk of loss, the fact that it is clear who creates the risk of loss fully supports the conclusion that my first proposal,

Exhibit A, is fair and equitable in that those who create the risk of loss are the ones who ought to bear the cost of funding for that risk of loss.

SECOND PROPOSAL: ASSESS ONLY LAW FIRMS ON A "PER ATTORNEY" BASIS

Another option for the Court to consider is placment of the cost of the risk of loss on law firms rather than on attorneys. (Exhibit B). Law firms provide the procedural and business framework for attorneys to do business with clients and govern the interrelationships among the attorneys so as to legally and ethically provide for the collective good of the members of the firm. Presumably this leaves each law firm in the optimal position to set forth acceptable procedures for the handling of client funds and to monitor compliance with those procedures. By having each law firm face periodic, if not annual, exposure to assessments to keep the Client Security Fund fiscally healthy, each law firm will be alerted of its need for constant vigilance. If the Client Security Board only had to collect funds and monitor the reporting of law firms, rather than individual attorneys, their job should be made somewhat easier. By having law firms be the source of contributions to the Client Security Fund, the

Court would also be assured of a uniform and equitable result: that the cost of the risk of loss would be a part of the law firms' overhead expenses which ultimately are passed on to the clients as users of the legal system.

By having each law firm pay a fee in accordance with the number of attorneys in the firm, the assessment would actually be an equivalent item of overhead expense for each revenue producing unit of the firm (that is, for each attorney). By structuring the fee in this way, all law firms would be competing on the same basis.

THIRD PROPOSAL: ALLOCATE FUNDS FROM THE MINNESOTA TRUST ACCOUNT BOARD

Under Rule 2, Rules of Lawyer Trust Account Board, the Trust Account Board receives funds from lawyers' interest bearing trust accounts and makes grants and appropriations as it deems appropriate for tax exempt public purposes.[8] By using a portion of these funds to keep the Client Security Fund fiscally sound (Exhibit C), the cost of the

8. In FY 1989 the IOLTA Trust Fund generated approximately $2.0 million and made disbursements of approximately $1.8 million. In FY 1990 the IOLTA Trust Fund generated approximately $2.1 million and made disbursements of approximately $1.9 million.

risk of loss is in direct relation to the amount of funds at risk. This is the most equitable and fair proposal and it has the least adverse impact on any law firm, attorney or client.

It could be argued, however, that the diversion of IOLTA funds for the purpose of keeping the Client Security Fund fiscally sound makes an adverse impact on the legal aid organizations[9] in the state who have been receiving the bulk of the proceeds generated from IOLTA. While it is true that IOLTA funds used for replenishing the Client Security Fund would be unavailable to help fund legal aid organizations, the grants previously made were purely discretionary on the part of the Trust Account Board. It should be borne in mind that the funds in the interest-bearing trust accounts are client funds. It seems fair to have the interest on these funds be used to reduce the overhead costs of providing legal services to those same clients by applying a portion of the interest revenue to the cost of insuring the safety of those funds. The

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9. These organizations include: Legal Aid Services of NorthEast Minnesota, Anishinabe Legal Services, SMRLS, Mid Minnesota Legal Services, Adjudicare of Anoka County, and NorthWest Minnesota Legal Services. In addition to the grants from IOLTA Trust Fund legal aid organizations received about $1.3 million for the FY1989 and FY 1990 biennium from the Supreme Court Civil Surcharge. (1989 Minn. Laws, ch. 335, art. 1, § 3, subd. 3).

revenues generated by IOLTA reflect, closer than any other measure, the degree of risk of loss since the contingency for which protection is needed is really the risk of loss of funds rather than the risk that a particular attorney will misappropriate the funds. Since IOLTA is computed on the basis of the funds on deposit in trust accounts, use of IOLTA revenues is the most appropriate, fair and equitable method of providing additional capital to the Client Security Fund.

D. REQUEST FOR MORE EFFECTIVE PREVENTATIVE MEASURES

The primary deficiency in the operation of the Client Security Fund is that the Fund, itself, can only operate as a sort of blood bank. Aside from the threat of professional sanctions and possible criminal liabilities, there are few, if any, effective mechanisms in place to deter or to reduce the liklihood of misappropriation. As long as the threat of misappropriation remains unabated, the problem will necessitate additional transfusions. We urgently need to reduce the risk of loss. Suppose Mr. O'Hagen had taken the millions and disappeared in the manner of Mr. Sampson? Suppose Mr. O'Hagen had not been associated with a law firm that was solvent and responsible?

One of the lessons of the O'Hagen episode is that verifiable withdrawal procedures with respect to trust accounts are needed. What particular procedures may be most appropriate is a matter that should be deserving of further study. As an opening proposal, I would propose procedures that will involve banking institutions and more than one attorney with respect to withdrawals from the trust accounts. For example, if amounts in a trust account could only be withdrawn upon the signatures of two authorized persons and if a draft or check were made payable to the order of both persons, banking laws might assist in the management of the risk of loss. Admittedly, procedures such as these wouldn't eliminate the problem, but it would be a step in the right direction.

Perhaps in the wake of the O'Hagen affair, Mr. O'Hagen's firm would be willing to share with the rest of the legal community its plans to prevent future recurrences of that particular episode. In that way the procedures now implemented by that law firm could be a model to be examined and adopted by other firms.

E. CONCLUSION

In order to preserve the viability of the Minnesota Client Security Fund and to protect the public, I request that the Court take the following action:

1. Deny the Client Security Board's proposed amendment that provides for a permanent, annual assessment of $25 per attorney.

2. Deny the Minnesota Bar Association's proposed amendment that provides for a one-year assessment of $50 per attorney with future assessments to be imposed as deemed necessary by the Court.

3. Adopt the most equitable and fair method of funding by authorizing one or more of the following options:

-- assess only those attorneys who handle client funds (Exhibit A); or

-- assess law firms on a per attorney basis (Exhibit B); or

-- allocate the necessary funds from the IOLTA Trust Account (Exhibit C).

4. In addition to whatever funding decision the Court makes, I would urge the Court to examine procedures or methods by which the problem of misappropriation can be reduced or eradicated.

Dated OCTOBER 16, 1990.

Respectfully submitted,

James W. Forbess
Lic. No. 30806
1025 Hallam Avenue
Mahtomedi, Minnesota 55115
(612)-426-5393 (H)
(612)-227-4200 (W)

EXHIBIT A

CONTRIBUTIONS FROM ATTORNEYS WHO HANDLE CLIENT FUNDS

PROPOSED AMENDMENTS TO MINNESOTA RULES OF THE SUPREME COURT FOR REGISTRATION OF ATTORNEYS

RULE 2. REGISTRATION FEE

In order to maintain the fiscal soundness of the Minnesota Client Security Fund, each attorney admitted to practice law in Minnesota and who is subject to the IOLTA reporting requirements shall pay to the clerk of the appellate courts the sum of Forty-Five Dollars ($45.00) on or before July 1, 1991.

Any sums so received shall be allocated to the Minnesota Client Security Fund.

EXHIBIT B

CONTRIBUTIONS FROM LAW FIRMS: "PER ATTORNEY" PROPOSAL

PROPOSED AMENDMENTS TO MINNESOTA RULES OF THE SUPREME COURT FOR REGISTRATION OF ATTORNEYS

RULE 2. REGISTRATION FEE

In order to maintain the fiscal soundness of the Minnesota Client Security Fund, each law firm that does business in Minnesota and that is subject to the IOLTA reporting requirements shall pay to the clerk of the appellate courts a sum equal to Forty-Five Dollars ($45.00) per attorney in the employ of the law firm as of April 1, 1991. The fee shall be paid on or before July 1, 1991.

Any sums so received shall be allocated to the Minnesota Client Security Fund.

EXHIBIT C

CONTRIBUTIONS FROM THE LAWYER TRUST ACCOUNT BOARD

PROPOSED AMENDMENTS TO MINNESOTA RULES OF THE LAWYER TRUST ACCOUNT BOARD

RULE 2. POWERS AND DUTIES

(c) Disbursement of Funds.

In order to maintain the fiscal soundness of the Minnesota Client Security Fund, the Lawyer Trust Account Board, before making any awards or disbursements from the funds received from lawyers' interest bearing trust accounts, shall annually pay to the clerk of the appellate courts such sums as directed by the court. Any such contribution shall be paid on or before the first day of July of each year as directed by the court.

Any sums so received shall be allocated to the Minnesota Client Security Fund.

The Board shall, by grants and appropriations it deems appropriate, disburse funds for the tax exempt

public puposes which the Board may prescribe from time to time consistent with Internal Revenue Code Regulations and rulings, including those under Section 501(c)(3).

James W. Forbess
1025 Hallam Avenue
Mahtomedi, Minnesota 55115
June 13, 1990

Mr. Fred Grittner
Clerk of Minnesota Appellate Courts
Room 230 State Capitol Building
St. Paul, Minnesota 55155

Re: Minnesota Supreme Court File No. C0-85-2205
Minnesota Client Security Fund
Petition for annual assessments

Dear Mr. Grittner:

Enclosed please find a letter in response to the petition filed by the Minnesota Client Security Board. I would appreciate it if this letter would be filed and included in File No. C0-85-2205.

If there are any rules, formal or otherwise, that pertain to the Supreme Court's rule promulgating procedures I would appreciate it if you could direct my attention to any such material.

Very truly yours,

James W. Forbess

James W. Forbess
227-4200(Work)
426-5393(Home)
Lic. No. 30806

enc.

James W. Forbess
1025 Hallam Avenue
Mahtomedi, Minnesota 55115
June 13, 1990

Martin A. Cole
Minnesota Client Security Board
520 Lafayette Road
St. Paul, Minnesota 55155

Re: Minnesota Supreme Court File No. C0-85-2205
Minnesota Client Security Fund
Petition for annual assessments

Dear Mr. Cole:

I am greatly disappointed to learn that the Client Security Board has filed a petition to have the Minnesota Supreme Court authorize an annual assessment to further fund the Client Security Fund. Of even greater irritation, however, is fact that the petition seeks to exempt many individuals who unquestionably add to the risk of loss, while at the same time providing no relief to those attorneys in my situation: namely, attorneys who do not have clients, or attorneys who do not handle client funds.

Last fall, we discussed my concerns, so the fact that I am opposed to this petition comes as no surprise to you. To my knowledge the Client Security Board has not independently reviewed the issue and is only the messenger bringing the petition before the Minnesota Supreme Court. The actual crafting of the contents of the petition, I suspect, is the product of whatever committee of the Minnesota State Bar Association has been set to that task. Since I am not a member of that esteemed and expensive organization, and since my interests on this matter run diametrically opposed to many, if not most, of the attorneys in that organization, I did not engage in any dialogue with them. At our discussion last fall as I attempted to have the Client Security Board take a fresh, proactive approach in dealing with attorney misappropriations, I learned that the Client Security Board does not undertake to study and propose its own solutions to the Minnesota Supreme Court. My quest for a neutral and unbiased forum to consider my objections and suggestions continues.

In order that I may make known my concerns and objections to the Minnesota Supreme Court before it makes any disposition with respect to the petition, I respectfully make the following request:

1. that I be provided with copies of any documentation filed in conjunction with this matter; and

2. that I be notified in writing of any hearing on the petition.

Since I am unaware of any published rules pertaining to proper procedure before the Minnesota Supreme Court in its rule promulgating capacity, it is my intent to seek, by whatever form appropriate, whether by motion, counter-petition, other responsive formal pleading, or by this letter, to have the Minnesota Supreme Court grant the following requests:

1. that I be granted the opportunity to appear before the Court to speak in opposition; and

2. that the petition be dismissed or remanded for a more equitable solution with full and fair participation by nonmembers of the Minnesota State Bar Association; or

3. that, alternatively, the exemption from the client security fund assessment include any attorneys who do not handle client funds; or

4. that, alternatively, a variance be granted to me on the grounds that maintenance of my licensure as an active attorney is a benefit to the bench and bar of Minnesota and poses no risk of harm to the public as contemplated by the Minnesota Client Security Fund.

In the interest of providing the Minnesota Supreme Court with a factual basis for reviewing its assessment policy, I am requesting you provide me with the following information.

1. How many attorneys licensed to practice law in Minnesota do not handle client funds? (This information is available to the Client Security Board/Lawyers Professional Responsibility Board in the form of the total number of check-offs on all the annual attorney registration forms).

2. How many attorneys licensed to practice law in Minnesota handle client funds? (This information is available to the Client Security Board/Lawyers Professional Responsibility Board in the annual attorney registration forms).

3. How many attorneys are licensed to practice law in Minnesota (if other than the sum of the answers to questions 1 and 2)? (This information is available to the Client Security Board/Lawyers Professional Responsibility

Board in the annual attorney registration forms).

4. Does the number of attorneys who do not handle client funds include those attorneys who are "retired and not gainfully employed"? (This information is available to the Client Security Board/Lawyers Professional Responsibility Board in the annual attorney registration forms).

5. How many attorneys are exempt from the assessment because they were "retired and not gainfully employed"? (This information is available to the Client Security Board/Lawyers Professional Responsibility Board in the annual attorney registration forms).

6. Does your office know, or have any way to determine, how many of the attorneys exempted by their status as "retired and not gainfully employed" were receiving pension or profit-sharing checks from law firms with ongoing practices?

7. How many additional attorneys will be exempt from the assessment under the petition to exempt attorneys who have been licensed for four years or less? (This information is available to the Client Security Board/Lawyers Professional Responsibility Board).

If you or the Client Security Board/Lawyers Professional Responsibility Board are unable to provide me with the requested information, please provide me with a written reason for the basis of the denial pursuant to Rule 7, subdivision 3, of the Rules of Public Access to Records of the Judicial Branch.

You may recall from our discussion last fall that my particular circumstances are that I am a legal editor for a law book publishing company. In this field, licensure, and not just a law degree, projects a measure of credibility and standard of excellence. By maintaining my licensure my employer has an incentive to assist me in my efforts to satisfy the CLE requirements. The knowledge I gain from CLE gives me a perspective which derivatively benefits those who use publications I service.

The essence of my position can be summarized as follows:

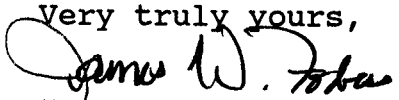
1. Those attorneys who do not handle client funds ought not to be obligated to bear the financial burden of the risk of loss created by those attorneys who do handle client funds.

2. Existing and proposed exemptions from the assessment are unfair with respect to licensed attorneys whose gainful employment does not involve clients or client funds.

3. Protection of the public involves more than just bankrolling the misconduct of attorneys; preventive measures, however difficult or complex, are necessary to protect against further erosion of the public confidence in the attorneys with whom the public deals.

I appreciate your thoughtful attention to this matter and I look forward to your prompt reply.

Very truly yours,



James W. Forbess
227-4200(Work)
426-5393(Home)
Lic. No. 30806

MINNESOTA CLIENT SECURITY BOARD
520 LAFAYETTE ROAD
FIRST FLOOR
ST. PAUL, MINNESOTA 55155-4196

TELEPHONE (612) 296-3952
TOLL FREE 1-800-657-3601
FAX (612) 297-5801

October 26, 1990

Office of Appellate Courts
25 Constitution Avenue
Room 245
St. Paul, MN 55155

Re: Petition of the Minnesota Client Security Board for Amendment of Rules Relating to Registration of Attorneys.

Dear Clerk:

Enclosed for filing in the above matter, pursuant to the Court's September 20, 1990, order, are 12 copies of the request of Melvin I. Orenstein to make an oral presentation, and 12 additional copies of the Board's June 8, 1990, petition and statement in support of the petition, and Mr. Orenstein's September 14, 1990, letter to Chief Justice Popovich.

Very truly yours,

William J. Wernz
Director

By Martin A. Cole
Martin A. Cole
Assistant Director

ma
Enclosures
cc: Melvin I. Orenstein (no enclosures)
Honorable A. M. Keith (no enclosures)

FILE NO. C9-81-1206

STATE OF MINNESOTA

IN SUPREME COURT

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

In Re Petition of the Minnesota Client Security Board for Amendment of Rules Relating to Registration of Attorneys.

REQUEST TO MAKE ORAL PRESENTATION

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

TO: The Supreme Court of the State of Minnesota:

Melvin I. Orenstein, Chairman of the Minnesota Client Security Board, hereby requests permission of the Court to make an oral presentation at the hearing on the above matter, scheduled for November 9, 1990, at 9:00 a.m.

Dated: October 26, 1990.

Respectfully submitted,

MELVIN I. ORENSTEIN, CHAIRMAN
MINNESOTA CLIENT SECURITY BOARD
Attorney No. 82764
80 South Eighth Street
Suite 4200
Minneapolis, MN 55402
(612) 371-3211

WILLIAM J. WERNZ, DIRECTOR
MINNESOTA CLIENT SECURITY BOARD
Attorney No. 11599X

By Martin A. Cole
MARTIN A. COLE
ASSISTANT DIRECTOR
Attorney No. 148416
520 Lafayette Road, 1st Floor
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(612) 296-3952

MINNESOTA CLIENT SECURITY BOARD

520 LAFAYETTE ROAD
FIRST FLOOR
ST. PAUL, MINNESOTA 55155-4196

612-296-3952

September 14, 1990

The Honorable Peter S. Popovich
Chief Justice
Supreme Court of Minnesota
25 Constitution Avenue
St. Paul, MN 55155

C9-81-1206

Re: Minnesota Client Security Board Petition for an Increase in the Attorney Registration Fee.

Dear Chief Justice Popovich:

I am writing to request the Minnesota Supreme Court to approve the additional funding sought by the Client Security Board. The Board believes its proposal for a $25 annual assessment is superior to the MSBA's proposal for a one-time $50 assessement.

The Minnesota Client Security Board filed a petition for an increase in the annual attorney registration fee to help maintain and slowly increase the balance of the Client Security Fund. The Board also filed a statement and supporting documents showing that without additional revenues the Board cannot pay all valid claims up to $50,000, as it has done through its first three years of operation. Based upon current budget projections, with the requested increase the Board hopes to be able to return the Fund to approximately $1,000,000 in about seven years.

The Board recently obtained a copy of the MSBA alternative petition, which requests a one-time lump sum assessment of $50 per attorney. The Board discussed this matter at its August 27, 1990, meeting and wishes to inform the court that the Board believes its original petition to be the more reasonable and prudent approach.

Attached are duplicate copies of the Board's budget projections with the Board's proposed fee increase. Also attached are similar budget projections using the MSBA's approach.[1] While

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The Client Security Board's petition calls for an increase in the registration fee only for attorneys who have been practicing more than three years. Although the MSBA's alternate petition does not specify that it is limited to that category, the budget projections using the MSBA approach assume that it would apply only to individuals in the more than three year category.

the MSBA approach results in an initial increase to the Fund, within three years the Fund would likely be in a similar financial position to that which faces the Board currently, and which triggered the present fee increase request.

I believe the concerns of the MSBA can be met by limiting the proposed annual assessment to a specific period. For example, the assessment could be limited to five years, after which it could be reviewed to determine whether to suspend the assessment. Or, after five years, the Board could be required to file a new petition to continue the assessment. Either of these methods are superior because: (1) it will allow the Board to more accurately plan for future income without the concern that claim payments may need to be limited due to decreasing funds every two to three years and the corresponding need to obtain a new commitment from the bar to a request for another assessment; and (2) it will result in savings, both in cost and time, to the Board and its staff by eliminating the need for preparation of frequent petitions for funding increases, the administrative cost of which comes out of funds otherwise available to pay claims, and by eliminating the need to periodically discontinue and then reinitiate the court's administrative procedure for collection of the assessment. Also, while the MSBA wants to remind lawyers of the problems of lawyer defalcation, the Board's major concern is to assure the public that steady funding will be available should future defalcations occur.

The Board is glad that the MSBA accepts the need for full funding to maintain the Client Security Fund and the work of the Board. The Board does not regard the MSBA position as being unreasonable. The Board respectfully requests, however, that the Court implement the Board's original petition rather than the MSBA's approach.

Respectfully submitted,

Melvin I. Orenstein
Chairman

ma
Enclosures
cc: The Honorable A. M. Keith
William J. Wernz
Thomas W. Tinkham
Clerk of Appellate Courts

5/8/90

ASSUMES $25.00 FEE INCREASE EFFECTIVE 7/1/91

Minnesota Client Security Board
FY'92
Summary

Balance Forward In 7/1/91			**$489,639**
Income			
Atty fees:			
13094 @ $25	$327,350	(5+ yr attys)	
800 @ $50	$40,000	(new admittees)	
700 @ $50	$35,000	(4th yr attys)	
	$402,350		
Interest 7.5%	$47,262		
Total Income			**$449,612**
TOTAL AVAILABLE FUNDS			**$939,251**
FY'92 ESTIMATED EXPENDITURES & PAYOUTS			**$375,792**
ESTIMATED BALANCE 6/30/92			**$563,459**

FY'93

Balance Forward In 7/1/92			**$563,459**
Income			
Atty fees:			
13794 @ $25	$344,850	(5+ yr attys)	
800 @ $50	$40,000	(new admittees)	
700 @ $50	$35,000	(4th yr attys)	
	$419,850		
Interest 7.5%	$54,123		
Total Income			**$473,973**
TOTAL AVAILABLE FUNDS			**$1,037,432**
FY'93 ESTIMATED EXPENDITURES & PAYOUTS			**$394,582**
ESTIMATED BALANCE 6/30/93			**$642,850**

EXHIBIT 3

5/8/90

ASSUMES $25.00 FEE INCREASE EFFECTIVE 7/1/91

Minnesota Client Security Board
FY'94
Summary

Balance Forward In 7/1/93			**$642,850**
Income			
Atty fees:			
14494 @ $25	$362,350	(5+ yr attys)	
800 @ $50	$40,000	(new admittees)	
700 @ $50	$35,000	(4th yr attys)	
	$437,350		
Interest 7.5%	$61,458		
Total Income			**$498,808**
TOTAL AVAILABLE FUNDS			**$1,141,658**
FY'94 ESTIMATED EXPENDITURES & PAYOUTS			**$414,311**
ESTIMATED BALANCE 6/30/94			**$727,347**

FY'95

Balance Forward In 7/1/94			**$727,347**
Income			
Atty fees:			
15194 @ $25	$379,850	(5+ yr attys)	
800 @ $50	$40,000	(new admittees)	
700 @ $50	$35,000	(4th yr attys)	
	$454,850		
Interest 7.5%	$69,224		
Total Income			**$524,074**
TOTAL AVAILABLE FUNDS			**$1,251,421**
FY'95 ESTIMATED EXPENDITURES & PAYOUTS			**$435,026**
ESTIMATED BALANCE 6/30/95			**$816,395**

5/8/90

ASSUMES $25.00 FEE INCREASE EFFECTIVE 7/1/91

Minnesota Client Security Board

FY'96

Summary

Balance Forward In 7/1/95			**$816,395**
Income			
Atty fees:			
15894 @ $25	$397,350	(5+ yr attys)	
800 @ $50	$40,000	(new admittees)	
700 @ $50	$35,000	(4th yr attys)	
	$472,350		
Interest 7.5%	$77,364		
Total Income			**$549,714**
TOTAL AVAILABLE FUNDS			**$1,366,109**
FY'96 ESTIMATED EXPENDITURES & PAYOUTS			**$456,778**
ESTIMATED BALANCE 6/30/96			**$909,331**

FY'97

Balance Forward In 7/1/96			**$909,331**
Income			
Atty fees:			
16594 @ $25	$414,850	(5+ yr attys)	
800 @ $50	$40,000	(new admittees)	
700 @ $50	$35,000	(4th yr attys)	
	$489,850		
Interest 7.5%	$85,814		
Total Income			**$575,664**
TOTAL AVAILABLE FUNDS			**$1,484,995**
FY'97 ESTIMATED EXPENDITURES & PAYOUTS			**$479,616**
ESTIMATED BALANCE 6/30/97			**$1,005,379**

9/10/90

ASSUMES $50.00 ASSESSMENT 7/1/91

Minnesota Client Security Board
FY'92
Summary

Balance Forward In 7/1/91			**$489,639**
Income			
Atty fees:			
13094 @ $50	$654,700	(5+ yr attys)	
800 @ $50	$40,000	(new admittees)	
700 @ $50	$35,000	(4th yr attys)	
		$729,700	
Interest 7.5%		$63,668	
Total Income			**$793,368**
TOTAL AVAILABLE FUNDS			**$1,283,007**
FY'92 ESTIMATED EXPENDITURES & PAYOUTS			**$375,792**
ESTIMATED BALANCE 6/30/92			**$907,215**

FY'93

Balance Forward In 7/1/92			**$907,215**
Income			
Atty fees:			
800 @ $50	$40,000	(new admittees)	
700 @ $50	$35,000	(4th yr attys)	
		$75,000	
Interest 7.5%		$69,087	
Total Income			**$144,087**
TOTAL AVAILABLE FUNDS			**$1,051,302**
FY'93 ESTIMATED EXPENDITURES & PAYOUTS			**$394,582**
ESTIMATED BALANCE 6/30/93			**$656,720**

9/10/90

Minnesota Client Security Board
FY'94
Summary

Balance Forward In 7/1/93			**$656,720**
Income			
Atty fees:			
800 @ $50	$40,000	(new admittees)	
700 @ $50	$35,000	(4th yr attys)	
		$75,000	
Interest 7.5%		$44,600	
Total Income			**$119,600**
TOTAL AVAILABLE FUNDS			**$776,320**
FY'94 ESTIMATED EXPENDITURES & PAYOUTS			**$414,311**
ESTIMATED BALANCE 6/30/94			**$362,009**

FY'95

Balance Forward In 7/1/94			**$362,009**
Income			
Atty fees:			
800 @ $50	$40,000	(new admittees)	
700 @ $50	$35,000	(4th yr attys)	
		$75,000	
Interest 7.5%		$15,916	
Total Income			**$90,916**
TOTAL AVAILABLE FUNDS			**$452,925**
FY'95 ESTIMATED EXPENDITURES & PAYOUTS			**$435,026**
ESTIMATED BALANCE 6/30/95			**$17,899**

File No. C9-81-1206

STATE OF MINNESOTA

IN SUPREME COURT

Rules for
Registration
of Attorneys

MEMORANDUM IN SUPPORT
OF PETITION OF MINNESOTA
STATE BAR ASSOCIATION

INTRODUCTION

The Minnesota State Bar Association (MSBA) filed a petition with the Minnesota Supreme Court in July 1990 requesting a further one-time assessment of $50 on attorneys licensed in Minnesota to maintain the balance of the Minnesota Client Security Fund and to support the work of the Minnesota Client Security Board. This petition was in response to a petition filed by the Client Security Board in June requesting a permanent annual assessment of $25. Melvin Orenstein, Chairman of the Board, wrote to Chief Justice Popovich in response to the MSBA petition in a letter dated September 14. This letter suggests a five-year limit on the

$25 assessment. Attorney James Forbess filed a statement in October urging the Court not to adopt the amendments suggested by the Client Security Board or the MSBA.

This memorandum explains the reasoning for the MSBA petition and responds to the concerns expressed by Mr. Orenstein and Mr. Forbess.

A. The MSBA proposed the creation of the Minnesota Client Security Fund and the Client Security Board, continues to support it, and will do so in the future upon a showing of need.

In November 1985, the MSBA petitioned this Court for creation of the Minnesota Client Security Fund, to be administered by the Client Security Board. The MSBA recommended this system to replace its voluntary client security fund which was substantially underfunded and unable to meet then-pending claims. The MSBA determined that a court-administered system funded by all lawyers would more adequately fulfill the objectives of upholding public confidence in the profession, aiding those persons directly injured by the wrongful act of any lawyer, reducing the adverse effect on the entire bar by an individual lawyer's act and preserving professional integrity.

The Court created the Minnesota Client Security Board in April 1986 and the Fund began operation in 1987. At that time, the functions performed by the MSBA client security fund were transferred to the Court along with the money then in the fund.

In the spring of 1990, the Client Security Board asked the MSBA to support its proposed $25 annual increase in the attorney registration fee to meet a projected shortfall in the Fund. The MSBA considered this item at the Board of Governors and General Assembly meetings in June at the annual bar convention. A substitute motion was passed for a one-time assessment of $50.

During debate, the MSBA's commitment to the ongoing work of the Client Security Board was emphasized. It was clear from the discussions that assessments requested upon a showing of actual need are likely to be supported by the bar: The creation of the Fund was the MSBA's idea and the continuing desire to support the Fund is demonstrated by the action at the convention. If the one-time $50 assessment is inadequate after a period of years, the MSBA urges the Client Security Board to request additional assessments upon lawyers at that time. Continued support is expected upon a demonstration that the Fund will be depleted. Affording lawyers the opportunity to respond to the needs of

the Board on a periodic basis, as funds are depleted, will demonstrate ongoing support for the program and a continuing desire to uphold public confidence in the legal and judicial systems.

B. Periodic requests for assessments, upon a showing of actual need, will focus the profession upon the issue of defalcation of client funds.

Periodic requests for assessments, upon a showing of actual need, will serve the desirable goal of focusing the attention of lawyers on the serious issue of defalcation of client funds. The opportunity for debate upon the merits of an increase in attorney registration fees will reinforce in lawyers the importance of safeguards to prevent lawyer theft, provide a forum for discussion of acceptable procedures for the handling of client funds, and alert the profession once again to the need for constant vigilance. Lawyers will have an opportunity each time a request is made to renew their commitment to funding it adequately.

A permanent annual assessment, on the other hand, will not give the profession the opportunity to demonstrate to the public and itself the continuing commitment to redressing the misdeeds of individual lawyers. Rather, effective

periodic review of the problem by those responsible for client funds will be less likely. The appearance to the public of continued voluntary support for the Fund will be decreased. Lawyers will pay the increased fee with limited awareness that part of the fee stems from lawyer theft. The increase will operate as a tax without the opportunity for those affected to participate in a discussion of the amount of or need for the tax.

The organized bar operated its own fund for 22 years; it then proposed the creation of a court-administered program to enhance effectiveness. The MSBA believes that, due to the history of support and the profession's stake in the issue, it ought to be involved in periodic discussions of the need for increased funds.

C. <u>The proposed permanent annual $25 assessment will result in a projected surplus of over $1,000,000, which is an unwarranted use of lawyer funds.</u>

According to projections of the Client Security Board, the following estimated Fund balances will occur <u>after</u> payment of expenses and claims if a $25 permanent assessment is imposed:

1992	$ 563,459
1993	$ 642,850
1994	$ 727,347
1995	$ 816,395
1996	$ 909,331
1997	$1,005,379

The Client Security Board has not adequately demonstrated a rationale for such reserves or the need for a surplus of over $1,000,000. The MSBA submits that a goal of surplus funds over $1,000,000 is an unwarranted and unnecessary use of lawyer funds without a demonstration of the need for such reserves. Presumably, based on the Board's projections, the surplus would continue to increase yearly after 1997. The MSBA believes that such excess funds are unnecessary to maintain the work of the Client Security Board. While the MSBA agrees that a limited reserve may be necessary to address unexpected large defalcations, the MSBA does not support a reserve without limits and without a clearly articulated policy on the amount of reserves necessary to protect the public.

D. <u>The one-time $50 assessment proposed by the MSBA is sufficient to meet the anticipated need for the next three years.</u>

According to projections of the Client Security Board, the following estimated Fund balances will occur after payment of expenses and claims if the MSBA's proposal for a one-time $50 assessment is adopted:

1992	$907,215
1993	$656,720
1994	$362,009
1995	$ 17,899

According to these projections, a one-time $50 assessment will result in funds sufficient to meet the anticipated needs for the next three years. As a policy matter, the MSBA believes it to be fiscally more sound to fund the program on an as-needed basis rather than create an ever-increasing surplus far larger than currently anticipated expenditures and claims. If the Fund is depleted after three years as anticipated, the MSBA urges the Board to request additional funds at that time. Doing so would provide even greater flexibility and responsiveness. If an unusually large theft occurred resulting in a large number of claims (recognizing a per-claim cap), the Board can evaluate the appropriate assessment needed at the time.

E. The MSBA disagrees that the additional administrative costs in connection with periodic requests for assessments are sufficient reason to implement a permanent assessment.

The Client Security Board suggested in its September letter to the Court a five-year limit on the $25 assessment. Mr. Orenstein states that a five-year limit on the Board's proposed assessment will result in savings of cost and time because the Board and its staff will not be required to prepare frequent petitions for funding increases, the cost of which comes from funds otherwise available for claims, or to periodically discontinue and then initiate procedures for collection of the assessment. The MSBA believes that the administrative burden of preparing petitions for funding increases is minimal or none at all. The administrative costs of compiling and distributing information about the fiscal operations of the program must be borne every year regardless of the size of the attorney registration fee. The MSBA believes that procedures for collection of the assessment are well in place after three years of operation, given that new admittees have been assessed each year since 1987. Thus, the MSBA submits that these administrative arguments are not compelling.

F. The MSBA disagrees with Mr. Forbess' argument that only attorneys who handle client funds should be assessed for the Fund.

The MSBA believes now, as it did in 1985 when it proposed creation of the Fund, that all lawyers licensed in Minnesota should bear the costs of the Client Security Fund without regard to whether an individual lawyer actually handles client money. By virtue of obtaining a license to practice law and regardless of a lawyers' employment at any moment in time, every lawyer has access to private clients and thus to sums of money. A corporate or government lawyer who does not regularly handle client funds in the course of his or her employment may nonetheless engage in the practice of law outside his or her primary employment. Further, a corporate or government lawyer may leave that position at any point during the year and enter private practice. Requiring those lawyers to pay the assessment at that time would be administratively difficult and impossible to enforce. On a philosophical level, the MSBA believes that paying into the Fund is a professional obligation of <u>all</u> lawyers commensurate with the goal of maintaining public confidence in the profession and preserving profesional integrity.

Mr. Forbess' claim that identifying lawyers who handle client funds would be possible by reviewing IOLTA reporting is unpersuasive. IOLTA reporting relates only to the keeping of trust funds. The Client Security Fund was established to help citizens harmed by lawyer theft regardless of whether the funds were in a trust account subject to IOLTA reporting.

Mr. Forbess' claim that lawyers in private practice do not personally pay assessments is incorrect. Even if a firm pays the bill, it is simply a deduction from each partners' earnings. Regardless, the MSBA believes that the purpose of the Client Security Fund is to assume the risks involved in the practice of law collectively as a profession.

G. The MSBA disagrees with Mr. Forbess' argument that only law firms should be assessed for the Fund.

The MSBA believes that the suggestion of assessing law firms on a "per attorney" basis is completely unworkable. First, requiring all firms doing business in Minnesota to contribute to the Minnesota Client Security Fund would necessitate collections from law firms throughout the country. This would be impossible administratively. Second, identifying just Minnesota law firms would be not only a massive task but one that is currently impossible. Neither the Supreme Court, the Secretary of State, the MSBA nor any other agency collects or maintains complete lists of law firms in Minnesota. Given the fluid nature of law firm practice, developing such lists and keeping them current would be a never-ending task for which there would be no observable corresponding benefit.

H. The MSBA agrees with Mr. Forbess' statement that effective preventive measures to eliminate lawyer theft are needed.

The MSBA concurs with Mr. Forbess that effective mechanisms should continue to be designed to deter or reduce the likelihood of lawyer defalcation. The MSBA appointed a committee in 1988 to explore random audits of trust accounts. The MSBA appointed a committee in 1989 to investigate mandatory reporting of trust account overdrafts. The MSBA believes that other programs designed to prevent lawyer theft, including those suggested by Mr. Forbess, should be positively studied.

CONCLUSION

The MSBA believes, for all the reasons outlined above, that the problem of lawyer theft can be most effectively addressed through the efforts of the Minnesota Client Security Board by a one-time assessment of $50 on all lawyers licensed in Minnesota for more than three years, exempting retired and permanently disabled lawyers and judges. The MSBA respectfully requests adoption of its petition filed with the Court in July 1990.

October 22, 1990

Minnesota Supreme Court
c/o Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Ave.
St. Paul, Minnesota 55155

Dear Chief Justice and Justices:

Pursuant to the Court's Order of September 20, 1990, enclosed please find 12 copies of my written statement in opposition to the petitions of the Minnesota Client Security Board and the Minnesota State Bar Association to amend Rule 2, Rules of the Supreme Court for the Registration of Attorneys, concerning the levying of a fee for the Minnesota Client Security Fund.

I would ignore my own beliefs and the welfare of my family if I did not comment on what I believe to be the unfair assessment of the fee regardless of whether it is taxed at $25 per year or $50 on a less regular basis. As a public employee-lawyer, I am neither in a position to appropriate a client's money so as to impose a claim on the Fund nor am I in a position to increase my "fees" to my clients to recoup the loss of income occasioned by the fee. In essence, members of my family suffer the direct loss of income because of the fee.

Except as specifically required by the Rules of Professional Conduct, I do not now nor have I ever felt

responsible for the actions of other attorneys, whether they be laudatory or deplorable. The proposed assessment, becoming a regular event, is no more than an attempt to raise revenue to improve the public image of some segments of the bar financed in no insubstantial part by others. This Court has previously concluded that license fees may not be imposed for revenue purposes. Minneapolis St. Ry. Co. v. City of Minneapolis, 229 Minn. 502, 510, 40 N.W.2d 353, 359 (1949), appeal dismissed, 339 U.S. 907, 70 S. Ct. 574 (1950). Instead, license fees are required to relate to the costs of the licensing activity. Minneapolis St. Ry. Co. v. City of Minneapolis, 236 Minn. 109, 119, 52 N.W.2d 120, 125 (1952). The proposed fee increase is designed to produce revenue for a purpose which is not really related to the cost of the licensing attorneys. The functions of issuing attorneys' licenses, investigating complaints and disciplining attorneys can readily be performed without the purpose for which the increase is proposed. The recency of raising the amount of the attorney licensing fee for the benefit of the Client Security Fund evidences the lack of any real connection between the fund and the licensing function.

In addition, imposing the assessment on all attorneys is simply too broad to be reasonably related to any need to protect some attorneys' clients. The true crux of the problem, if one exists, is the apparently irresistible temptation presented to some attorneys who have amassed

large amounts of money which is not theirs. Instead of assessing those who either choose not to amass large amounts of others' money or are not in a position to do so, let those attorneys who amass clients' funds bear the financial burden of their choice. Those who choose to amass clients' funds could be required to post a bond or other security to protect their clients' assets.

I request that the Court deny both of these petitions. It should be suggested to the petitioners that it is time for them to focus on those of the bar who are in a position to put their clients' funds at risk. If the Client Security Fund is still deemed to be appropriate, let the cost of supporting such a fund be on those members of the bar whose clients are in a position to lose money or property arising out of or in the course of the attorney-client relationship.

Respectfully submitted,

Charles T. Mottl
Atty. Reg. No. 75814
1270 W. Ryan Ave.
St. Paul, Minnesota 55113
(612) 644-6543