STATE OF MINNESOTA

IN SUPREME COURT

C9-81-1206
C0-85-2205

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE RULES OF THE SUPREME COURT FOR REGISTRATION OF ATTORNEYS AND THE RULES OF THE MINNESOTA CLIENT SECURITY BOARD

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 17, 1993 at 1:30 p.m., to consider the petition of the Minnesota State Bar Association to amend the Rules of the Supreme Court for Registration of Attorneys and the Rules of the Minnesota Client Security Board. A copy of the petition containing the proposed amendments is 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 12, 1993 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 12, 1993.

Dated: September 17, 1993

BY THE COURT:

A.M. Keith
Chief Justice

STATE OF MINNESOTA
IN SUPREME COURT
Nos. C9-81-1206 & C0-85-2205

In re:

Amendment of the Rules of the Supreme Court for Registration of Attorneys and Rules of the Client Security Board

PETITION OF MINNESOTA STATE BAR ASSOCIATION

Petitioner Minnesota State Bar Association ("MSBA") respectfully petitions this Honorable Court to amend the Rules of the Supreme Court for Registration of Attorneys and Rules of the Minnesota Client Security Board.

1. Petitioner Minnesota State Bar Association ("MSBA") is a not-for-profit corporation of attorneys authorized to practice before this Honorable Court and the other courts of this state.

2. This Honorable Court has the exclusive and inherent power and duty to administer justice and to adopt rules of practice and procedure before the courts of this state and to establish the standards for regulating the legal profession. This power has been expressly recognized by the Legislature. See Minn. Stat. § 480.05 (1992).

3. This Honorable Court has adopted the Rules of the Supreme Court for Registration of Attorneys and the Rules of the Minnesota Client Security Board. Pursuant to those rules, this Honorable Court has jurisdiction and control over the Client Security Fund ("Fund") and the administration of the Fund.

4. In 1987 this Honorable Court amended the Rules of the Supreme Court for Registration of Attorneys to assume jurisdiction over the Fund. Theretofore, the Fund had been administered as a voluntary fund created and established by Petitioner MSBA. At the time the Court assumed jurisdiction over the Fund, it promulgated the Rules of the Minnesota Client Security Board. See Order Creating the Minnesota Client Security Board, No. C0-85-2205 (Minn., Apr. 15, 1986).

5. In 1990 this Honorable Court amended Rule 2 of the Rules of the Supreme Court for Registration of Attorneys. This order also directed the Petitioner, as well as the Client Security Board, to "continue to monitor these rules and amendments and [to] explore ways of permanently financing the Client Security Fund." See In re Amendments to the Rules of the Supreme Court for Registration of Attorneys, No. C9-81-1206 (Minn., Nov. 14, 1990).

6. Pursuant to the 1990 Order, in early 1991 the MSBA established a Client Protection Committee ("MSBA Committee") to consider issues and problems arising under the existing Rules governing the administration and financing of the Fund. The MSBA Committee studied these issues in detail, met at least eleven times between early 1991 and early 1993, and issued its Report of the Client Protection Committee ("Report") on January 29, 1993. A true and correct copy of this Report is attached to this Petition as Exhibit A and by this reference is made part hereof.

7. The MSBA accepted the Report and resolved to carry out its recommendations by action of its Board of Governors on April 24, 1993, and of its General Assembly on June 24, 1993, at its annual convention. This Petition was authorized and endorsed at that time.

8. The MSBA respectfully recommends and requests this Court to amend the Rules of the Supreme Court for Registration of Attorneys and the Rules of the Minnesota Client Security Board as follows:

a) Rule 2 of the Rules of the Supreme Court for Registration of Attorneys should be amended to retain the existing language of the rule but to delete the provision of the order adopting the rule that causes the $20.00 fee to be collected only until July 1, 1995. See Order, In re Amendments to the Rules of the Supreme Court for Registration of Attorneys, No. C9-81-1206, ¶ 5 (Minn., Nov. 14, 1990). Petitioner requests that the fee be collected permanently, pending further order of the Court and that the Minnesota Client Security Board be directed to advise the Court in the Board's annual report when the Fund's reserve account reaches $2,500,000 in value. This amendment is requested to implement Recommendation 1 of the Report.

b) Rule 3.14 of the Rules of the Minnesota Client Security Board should be amended to add a new subdivision (c) as follows:

RULE 3.14 DETERMINATION

* * *

c. The maximum amount that may be paid to any claimant for a single claim is $100,000. In exceptional circumstances, the Board may allow a greater or lesser amount based on the factors set forth in subdivision (b) of this rule.

This amendment is requested to implement Recommendation 2 of the Report and is intended both to establish and modify the $50,000 payment cap that has been traditionally followed by the Board and to increase that cap to $100,000. Heretofore the Board has followed the practice of not paying more than $50,000 on any one claim, but this practice is an unwritten rule. Petitioner respectfully submits it should be made explicit as well as increased in amount to $100,000.

c) Rule 3.14 of the Rules of the Minnesota Client Security Board should be amended to add a new subdivision (d) as follows:

RULE 3.14 DETERMINATION

* * *

d. The Board may award interest on any award at the rate of interest payable on judgments on a discretionary basis from the date of filing the claim. In determining the amount of interest, if any, the Board may consider:

(1) The length of time between filing the claim and its disposition;

(2) The existence of third-party litigation; and

(3) Other factors outside the control of the Board.

This recommendation is made to implement Recommendation 3 of the Report.

9. Petitioner considered, but recommends no action on, suggestions that the rules be amended to provide for mandatory judicial review of Client Security Board decisions. The reasons for this recommendation are set forth in the Report at 90-91.

10. In addition to the foregoing rule amendments, Petitioner respectfully urges this court to consider appointment, from time to time, of an attorney from the public service sector as one of the lawyer members of the Client Security Board.

Based upon the foregoing authorities and the Report attached as Exhibit A, Petitioner Minnesota State Bar Association respectfully requests that this Honorable Court implement the rules amendments proposed in Paragraph 8, above and to take the further action regarding appointments to the Client Security Board as set forth in Paragraph 10.

Date: This ___ day of August, 1993.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By _____
Roger V. Stageberg
Its President

and

MASLON EDELMAN BORMAN & BRAND

By _____
David F. Herr (#44441)
3300 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 672-8350

ATTORNEYS FOR PETITIONER
MINNESOTA STATE BAR ASSOCIATION

JOHN J. WATERS
ATTORNEY AT LAW
SUITE 158
8120 PENN AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55431

612-884-5231
FAX 884-5232

November 10, 1993

Mr. Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: MSBA Petition

Dear Mr. Grittner:

Enclosed are the original and twelve copies of my Statement and Request to Make an Oral Presentation at the hearing in the above matter. It is expected that my comments will be brief.

Sincerely,

John J. Waters

JJW/jlp
Enclosures
cc: Steven Johnson
Roger V. Stageberg, Esq.
David F. Herr, Esq.
Marsha A. Johnson, Esq.

STATE OF MINNESOTA
IN SUPREME COURT
Nos. C9-81-1206 & CO-85-2205

In re:

Amendment of the Rules of the Supreme Court for Registration of Attorneys and Rules of the Client Security Board

REQUEST TO MAKE AN ORAL PRESENTATION

John J. Waters hereby files this Request to Make an Oral Presentation in support of the Petition of the Minnesota State Bar Association to amend the Rules of the Client Security Board.

Your Petitioner also requests that the Court consider having the Rule, if amended, apply to claims currently pending before the Client Security Board.

Dated: November 10, 1993

Respectfully requested,

John J. Waters, (#114777)
8120 Penn Ave. South, Suite 158
Bloomington, Minnesota 55431
(612) 884-5231

STATE OF MINNESOTA
IN SUPREME COURT
Nos. C9-81-1206 & CO-85-2205

In re:

Amendment of the Rules of the Supreme Court for Registration of Attorneys and Rules of the Client Security Board

STATEMENT OF JOHN J. WATERS

John J. Waters, as attorney for Annette F. Johnson and Steven H. Johnson, hereby files this Statement in support of the Petition of the Minnesota State Bar Association to amend the Rules of the Client Security Board to provide for a $100,000 maximum payment per claim. In doing so, the Court is urged to make the amendment applicable to all claims pending against the fund as of the date of the amendment to Rule 3.14, Rules of the Minnesota Client Security Board.

THE COURT SHOULD ADOPT A $100,000 MAXIMUM PER CLAIM

The stated objective of the Client Security Fund is to aide persons injured by attorney dishonesty during the attorney-client relationship. My clients feel that they have been injured by the dishonesty of attorneys during the attorney-client relationship in an amount that exceeds $300,000. As victims they feel that they themselves as well as other

members of the public seeking legal services would be better served by increasing the amount of the potential award for attorney dishonesty and making that amount a part of the rules themselves.

THE AMENDMENT SHOULD APPLY TO PENDING CLAIMS

In approving and implementing the amendment to Rule 3.14, the Court is urged to have it apply to claims that are currently pending before the Client Security Board. In late February, 1993, my clients became aware that their attorneys had, through manipulation and control, placed their personal lives, their personal financial affairs and their business affairs in jeopardy as well as the financial affairs of others. Since that time, they have:

1. provided information and documentation to other victims of these attorneys,

2. developed a work out plan for their personal and business financial affairs,

3. filed a detailed complaint with the Lawyers Professional Responsibility Board,

4. filed their claims with the Client Security Board, and

5. sought recovery from the attorneys through civil actions.

Of all the efforts they have expended, it appears that the most hopeful area of any recovery of their financial losses would lie with the

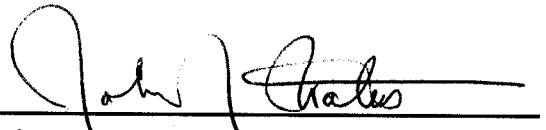
Client Security Board. They have been advised that the attorneys do not have sufficient assets to cover any judgment and have been further advised that the attorneys did not carry professional liability insurance.

CONCLUSION

It is respectfully requested, therefore, that the Court adapt the recommended change to Rule 3.14 of the Rules of the Minnesota Client Security Board as recommended by the Minnesota State Bar Association and that the Court take the further step of directing the Board to apply that rule to pending claims.

Dated: November 10, 1993

Respectfully submitted,



John J. Waters, (#114777)
8120 Penn Ave. South, Suite 158
Bloomington, Minnesota 55431
(612) 884-5231

DORSEY & WHITNEY
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

NEW YORK
WASHINGTON, D. C.
DENVER
ORANGE COUNTY, CA
LONDON
BRUSSELS

PILLSBURY CENTER SOUTH
220 SOUTH SIXTH STREET
MINNEAPOLIS, MINNESOTA 55402-1498
(612) 340-2600
FAX (612) 340-2868

ROCHESTER, MN
BILLINGS
GREAT FALLS
MISSOULA
DES MOINES
FARGO

WILLIAM J. WERNZ
(612) 340-5679

October 29, 1993

Mr. Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: MSBA Petition

Dear Mr. Grittner:

Enclosed are the original and 12 copies of my Statement and Request to Make an Oral presentation at the hearing in the above matter.

Very truly yours,

William J. Wernz

WJW/le
Enclosures
cc: Marcia A. Johnson, Esq.
Mrs. Helen L. Ainsley
Mr. Robert R. Mockenhaupt

STATE OF MINNESOTA
IN SUPREME COURT
Nos. C9-81-1206 & CO-85-2205

In re:

Amendment of the Rules of the Supreme Court for Registration of Attorneys and Rules of the Client Security Board

REQUEST TO MAKE AN ORAL PRESENTATION

William J. Wernz hereby files this Request to Make an Oral Presentation to support the Petition of the Minnesota State Bar Association to amend the Rules of the Client Security Board. This Request is also filed to request the Court to clarify and supplement the subject matter of the Petition by:

1. Providing that the proposed new Rule 3.14(c) of the Rules of the Minnesota Client Security Board, providing for a $100,000 maximum payment per claim be effective for all claims pending at the date of the Petition or thereafter filed; and

2. Providing for discretionary judicial review in cases of Client Security Board denial of substantial claims.

Dated: October 29, 1993.

DORSEY & WHITNEY

By _____
William J. Wernz (#11599X)
Pillsbury Center South
220 South Sixth Street
Minneapolis, Minnesota 55402-1498
Telephone: (612) 340-5679

STATE OF MINNESOTA
IN SUPREME COURT
Nos. C9-81-1206 & CO-85-2205

In re:

Amendment of the Rules of the Supreme Court for Registration of Attorneys and Rules of the Client Security Board

STATEMENT OF WILLIAM J. WERNZ

William J. Wernz hereby files this Statement to support the Petition of the Minnesota State Bar Association to amend the Rules of the Client Security Board. This Statement is also filed to request the Court to clarify and supplement the subject matter of the Petition by:

1. Providing that the proposed new Rule 3.14(c) of the Rules of the Minnesota Client Security Board, providing for a $100,000 maximum payment per claim be effective for all claims pending at the date of the Petition or thereafter filed; and
2. Providing for discretionary judicial review in cases of Client Security Board denial of substantial claims.

THE COURT SHOULD ADOPT A $100,000 MAXIMUM PER CLAIM

Petitioner Minnesota State Bar Association ("MSBA") has recommended that the Court add a new subdivision (c) to Rule 3.14 of the Rules of the Minnesota Client Security Board, to provide for a maximum payment of $100,000 to any claimant. This recommendation was made after an MSBA Committee met eleven times to study all pertinent matters. This exhaustive consideration in turn was

responsive to the Court's explicit direction that the MSBA consider whether and how the Rules might be amended (Petition ¶ 5).

The MSBA Committee, and this Court, also have the benefit of information and recommendations from the Assistant Director of the Client Security Board, Martin Cole. Mr. Cole has been closely involved with the Board since its inception, as the attorney assigned to assist the Board. "It is Cole's recommendation that the cap be raised to $100,000." (MSBA Report, at 88).

The MSBA Petition is timely. As it happens, several claims exceeding $50,000 have been pending for some months before the Board against attorneys Dennis John Morgeson, Sr. and Bruce Wyant. Attached as Exhibits 1 and 2, respectively, are judgments in favor of my clients Helen L. Ainsley against Dennis John Morgeson, Sr. in the amount of $180,400.75, dated September 30, 1993; and in favor of Robert R. Mockenhaupt against Dennis John Morgeson, Sr. in the amount of $495,604.62, dated October 20, 1993. As the exhibits show, the losses in these matters are not in dispute. However, the attorneys involved deny dishonesty, and the Board has not yet considered whether these claims are reimbursable. If they are eligible for Board payment, even $100,000 per claimant would compensate only a small portion of the losses -- twenty cents on the dollar for Mr. Mockenhaupt. Nonetheless, the additional $50,000 which could be paid to Mrs. Ainsley and Mr. Mockenhaupt, both of whom are retired and widowed, would be very important.

It is time to raise the cap for another reason -- inflation. While the rate of inflation has been moderate in the six years of the Board's existence, it has eroded

the value of the $50,000 cap and will continue in effect to lower the payment ceiling. By itself inflation would not warrant a $50,000 raising of the ceiling, but it may be taken into account in considering the MSBA proposal.

The explicit purpose of the Client Security Fund is "to aid those persons directly injured by the dishonest act of any lawyer during an attorney-client relationship." Rule 2.01. The Court's broader purpose in creating the Fund and Board is to assure clients that to some substantial extent they may trust their lawyers not to be dishonest. By adopting the MSBA's proposals the Court would serve these purposes.

THE COURT SHOULD MAKE ITS ORDER RAISING THE CAP EFFECTIVE FOR ALL PENDING CLAIMS AND FOR ALL CLAIMS FILED HEREAFTER.

The MSBA Committee Report was made on January 29, 1993 and adopted by the MSBA Board of Governors on April 24, 1993. The claims of Mrs. Ainsley and Mr. Mockenhaupt to the Client Security Board were made on April 30 and May 5, 1993. Claimants have also provided a great deal of useful information and documentation to the Office of Lawyers Professional Responsibility, beginning in March 1993.

If the increased cap were made effective only for claims made after the Court's Order, Mrs. Ainsley and Mr. Mockenhaupt would be penalized for making prompt claims, while those who made later claims against the same attorneys would receive enhanced benefits. Mrs. Ainsley and Mr. Mockenhaupt could have waited for the MSBA General Assembly to adopt the report and for the MSBA Petition, but to have done so would have impaired the functioning of the lawyer discipline system.

The Court should make clear which claims its Order affects, rather than burdening the Board with divining the Court's intent. Pending claims should be eligible for increased payment. The positive effect the Court's order could have on the public's view of the profession would be undone if the Court were to declare current claims ineligible.

THE COURT SHOULD AMEND THE RULES TO PROVIDE FOR DISCRETIONARY JUDICIAL REVIEW OF BOARD DENIALS OF SUBSTANTIAL CLAIMS.

The MSBA Report [at 91] recommends against "*mandatory* judicial review of Board Actions. . .." Although the Report [at 90] notes that the Board's claim proceedings would have to be formalized if "a rule *allowing* judicial review is adopted," the Report does not reach a conclusion regarding a rule permitting discretionary review. Such a rule would serve the Court, the Board and the public interest.

Rule 3.01 provides that "Reimbursements of losses by the Board are discretionary, and not a matter of right." The Court regularly reviews lower court decisions to determine whether a judge has abused his or her discretion. Although the Board continues to be composed of able and diligent members, abuse of discretion is always possible.

The Court reviews determinations of other of its Boards on a limited basis that does not unduly burden either the Court or the Boards. For example, the Court has discretion, upon a complainant's petition, to review Lawyers Board Panel dispositions under Rule 9(l), R. Law. Prof. Resp., to determine whether "the Panel acted arbitrarily, capriciously, or unreasonably. . .." Rule 9(m), R. Law. Prof. Resp.,

provides mandatory review of a respondent's admonition appeal, with the nature of the appellate proceedings being discretionary with the Court. Board denial of a $50,000 Client Security Board claim is ordinarily a more momentous matter than the matters governed by the discretionary review procedures under Rule 9. If the Court makes such denials still more momentous by raising the cap, a rule *allowing* Court review will be more appropriate.

Limited and discretionary review need not unduly burden the Board or Court. Most claims would not be reviewable either because they are granted or because they are not "substantial." (The Court could determine, for example, that only claims exceeding $25,000 are "substantial.") Discipline proceedings and the documents furnished by claimants normally furnish a sufficient record for the Client Security Board to make determinations without supplementary hearings. A statement by the Board explaining the reasons for its denial would give the claimant the reasoning he or she should get from a public body, and afford the Court a basis for review.

Discretionary judicial review is also appropriate for constitutional and public policy reasons. The Court's authority to create and fund the Client Security Board comes from the people of the State of Minnesota, through the constitutional powers given the Court. The Court should not implicitly say to citizens whose substantial claims are denied by the Board that the Court has created and maintained a Board which is free not only to exercise discretion but to abuse it. Clients are not fully *secure* if their claims can be arbitrarily denied, without recourse. The pure

discretion provision of Rule 3.01 is an atavism, related to a private organization which could dispense largesse as it pleased.

CONCLUSION

For the reasons stated above, the Court is respectfully requested to adopt the proposed rule amendments of the MSBA, to provide that the amendments are effective for all claims now pending or hereafter made to the Client Security Board and to further amend the Rules of the Client Security Board to provide for discretionary judicial review of denials by the Board of substantial claims.

Dated: October 29, 1993.

DORSEY & WHITNEY

By _____
William J. Wernz (#115990X)
Pillsbury Center South
220 South Sixth Street
Minneapolis, Minnesota 55402-1498
Telephone: (612) 340-5679

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

OTHER CIVIL

CONTRACT

File No. 93-16528

Helen L. Ainsley,

Plaintiff,

vs.

Dennis John Morgeson, Sr., Bruce P. Wyant, Wyant & Morgeson, P.A. and Annette F. Johnson,

Defendants.

ORDER FOR PARTIAL JUDGMENT AGAINST DEFENDANT DENNIS JOHN MORGESON, SR.

Plaintiff, Helen L. Ainsley, and defendant, Dennis John Morgeson, Sr., have filed a Stipulation in this matter,

Pursuant to which:

1. Morgeson admits and acknowledges personal liabilities to Mrs. Ainsley on all claims of Count I, totaling $180,400.75; and

2. Morgeson and Mrs. Ainsley agree that the court may enter judgment on Count I against Dennis John Morgeson, Sr., in the amount of $180,400.75; and

3. Morgeson and Mrs. Ainsley make certain other agreements regarding procedures with respect to pursuing the remaining Counts of the Complaint.

Based upon the Stipulation of Morgeson and Mrs. Ainsley,

EXHIBIT 1

IT IS HEREBY ORDERED:

1. Judgment is hereby ordered, and shall be entered immediately and without notice, in favor of Helen L. Ainsley against Dennis John Morgeson, Sr. in the amount of $180,400.75;

2. Pursuant to the Stipulation plaintiff may seek judgment against Morgeson for additional Counts of the Complaint and for additional amounts and such other relief as she deems appropriate in accord with the Stipulation; and

3. There is no just reason for delay in entering judgment against Dennis John Morgeson, Sr. Notwithstanding General Rules of Practice, Rule 125, the clerk is authorized and directed to enter judgment immediately.

Dated: Sept 30, 1993

BY THE COURT

Judge of District Court

REC'D OCT 25 1993

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED
93 OCT 22 AM 9:37
DISTRICT COURT ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

OTHER CIVIL

CONTRACT

Robert R. Mockenhaupt,

Plaintiff,

vs.

Dennis John Morgeson, Sr., Bruce P. Wyant, Wyant & Morgeson, P.A., Elizabeth Marie Morgeson and Annette F. Johnson,

Defendants.

File No. 93-16527

ORDER FOR PARTIAL JUDGMENT AGAINST DEFENDANT DENNIS JOHN MORGESON, SR.

Plaintiff, Robert R. Mockenhaupt, and defendant, Dennis John Morgeson, Sr., have filed a Stipulation in this matter,

Pursuant to which:

1. Morgeson admits and acknowledges personal liabilities to Mockenhaupt on all claims of Count I, totaling $495,604.62; and

2. Morgeson and Mockenhaupt agree that the court may enter judgment on Count I against Dennis John Morgeson, Sr., in the amount of $495,604.62; and

3. Morgeson and Mockenhaupt make certain other agreements regarding procedures with respect to pursuing the remaining Counts of the Complaint.

Based upon the Stipulation of the Morgeson and Mockenhaupt,

EXHIBIT 2

IT IS HEREBY ORDERED:

1. Judgment is hereby ordered, and shall be entered immediately and without notice, in favor of Robert R. Mockenhaupt against Dennis John Morgeson, Sr. in the amount of $495,604.62;

2. Pursuant to the Stipulation plaintiff may seek judgment against Morgeson for additional Counts of the Complaint and for additional amounts and such other relief as he deems appropriate in accord with the Stipulation; and

3. There is no just reason for delay in entering judgment against Dennis John Morgeson, Sr. Notwithstanding General Rules of Practice, Rule 125, the clerk is authorized and directed to enter judgment immediately.

Dated: October 20, 1993

BY THE COURT

Judge of District Court

November 8, 1993

Mr. Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Ave.
St. Paul, Mn 55155

Dear Mr. Grittner:

Enclosed are the original and the 12 copies of our statement to the Minnesota Supreme Court.

Yours respectfully,

William M. Bergen

William M.Bergen

Diana H. Bergen

Diana H. Bergen

November 8, 1993

Dear Honorable Justices of the Court:

My wife and I were essentially semi-retired for the past two years, that is until February of 1993 when it was discovered that we would no longer be paid any interest on the monies that we had entrusted to our lawyers, D. John Morgeson and Bruce P. Wyant. And in fact, the principal amount of $189,000.00 was gone. This amount is our retirement savings.

We are now both doing contract work wherever possible,as we found that being in your late 50's, we are not attractive candidates for corporate employment. During this time, my wife's health has diminished substantially due to the stress. She now has a chronic asthma condition.

We are petitioning the Court to raise the cap limits ofthe Client Security Board Fund from $50,000.00 to $100,000.00, in anticipation of the totally dishonest and unethical transactions, the Legal Responsibility Review Board will find in their investigations of the Wyant and Morgeson law firm.

We will very much appreciate yourconsideration in this matter and are hopeful that you are able to support our views.

Very Respectfully,

William M. Bergen

Diana H. Bergen

William M. Bergen and Diana H. Bergen 1993

TOTAL DAMAGES SUSTAINED THROUGH THE ACTIONS OF WYANT AND MORGESON

I	Principal	
	A. Wyant & Morgeson.P.A.	$114,000.00
	B. D. John Morgeson	$55,000.00
	C. Those Little Donuts, International	$20,000.00
		$189,000.00
11	Interest Lost through October 1993	
	All notes $1,803.34 x 8 months	$14,426.72
111	Attorneys fees for attempted recovery 1993	$5,118.75
	TOTAL FOR ALL ITEMS	$208,545.47

MINNESOTA CLIENT SECURITY BOARD

ATTACHMENT

4. a. Describe in detail what the lawyer did that was dishonest and how this caused your loss (if space is insufficient, you may attach more papers):

As the attached Complaint shows, both Mr. Wyant and Mr. Morgeson, on repeated occasions, induced us to lend money to them and to their law firm and assured us that the investments were to be used for the expansion of the firm, the practice of which they guaranteed was sufficient to guarantee the repayment of the loans, and in other investments that would assure repayment of the loans' principle when due. Both Mr. Wyant and Mr. Morgeson were aware that we had sustained substantial financial losses as a result of unsafe investments; and they were also aware that the money that we lent to them came from -- and indeed composed virtually all of -- our retirement and/or employment termination funds.

Each time they induced us to lend them money, both Mr. Wyant and Mr. Morgeson counseled that we could depend upon them conscientiously to care for our money, particularly in view of the professional relationship that we shared. These same assurances were repeated each time the various notes were renewed and/or consolidated. They repeatedly told us that, as our attorneys, they could be trusted and depended upon to see to it that our money was rigorously safe-guarded.

It was not until February of 1993 that we realized that, far from being safely invested, the money advanced to them had been dissipated, that both Mr. Wyant and Mr. Morgeson had been aware all along that neither they nor their law practice had or could generate sufficient money to repay the loans, and that the money had never been intended for investments of the type for which both Mr. Wyant and Mr. Morgeson repeatedly assured us they were destined. Instead, we have reason to believe that much of the money was literally gambled away at various casinos and other gambling establishments by Mr. Morgeson and/or Mr. Wyant, and that the balance was used in attempts to shore up questionable ventures in which Messrs. Wyant and Morgeson had personal financial interests of which we were never informed.

Both Mr. Wyant and Mr. Morgeson, as noted above, by virtue of their position as our attorneys, were aware of our earlier investment misfortunes; and they traded upon this awareness in their arguments in favor of our entrusting our money to them.

8. Has your loss caused you any special hardship? If so, please describe:

Yes. We have lost interest income of $1,803.34 per month which we used for fixed living expenses. (As well as $189,000 principal amount.) My wife and myself have been semi-retired for a number of years, doing part-time work to meet additional living expenses and for expendable funds. We now have grievous difficulty in meeting our monthly obligations, and additional legal fees. We have borrowed from what we have left in IRA's to meet these obligations and since we are both in our late fifties, we are not as employable as younger people for permanent positions. We will continue to lose ground financially unless some degree of return of funds is enacted.

Thank you for your consideration.

18400 Fifth Ave. N.
Plymouth, MN 55447

November 8th, 1993

Mr. Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: MSBA Petition

Dear Mr. Grittner:

Enclosed are the original and 12 copies of my written statement to be presented at the hearing in the above matter.

Very truly yours,

Helen L. Ainsley

Helen L. Ainsley

HA
Enclosures
cc William J. Wernz

STATE OF MINNESOTA
IN SUPREME COURT
Nos. C9-81-1206 & CO-85-2205

Amendment of the Rules of the Supreme Court for Registration of Attorneys and Rules of the Client Security Board

STATEMENT OF HELEN L. AINSLEY

Helen L. Ainsley hereby files this statement to support the Petition of the Minnesota State Bar Association to amend the Rules of the Client Security Board.

As you are aware from the claim filed on my behalf by Mr. Wernz, I am one of the victims of the massive theft perpetrated against their clients by Mr. D. John Morgeson and Mr. Bruce Wyant.

Over several years they systematically stole almost $200,000, which was the majority of the estate left by my deceased husband to sustain me in my old age. While they were taking my money they also charged me almost $69,000 in legal fees for "managing" my affairs and over $6,000 for preparing my tax returns.

Although I have a judgement against Mr. Morgeson and Mr. Wyant I have no reasonable hope of recovery because they claim to have no assets. Therefore the Client Security Board may be my only chance to recover any of my lost assets.

I beg the Court to approve the increase in the maximum payment to the $100,000 level requested by the Bar Asssociation. I feel strongly that the legal profession has a clear obligation to the public to protect us from predators like Mr. Morgeson and Mr. Wyant.

Thank you for giving serious consideration to my statement.

Helen L. Ainsley

Helen L. Ainsley

18400 5th Avenue North
Plymouth, Minnesota 55447

STATE OF MINNESOTA

IN SUPREME COURT

C5-87-843

WRITTEN STATEMENT OF DAVID B. ORFIELD,
PRESIDENT OF CREATIVE DISPUTE RESOLUTION

Creative Dispute Resolution (CDR) is a non-profit ADR organization founded by the Minnesota Trial Lawyers Association and the Minnesota Defense Lawyers Association.

As President of CDR, I call to the attention of the Minnesota Supreme Court two troubling proposals in the Final Report of the Supreme Court Alternative Dispute Resolution Implementation Committee.

1. The final report does not require that the mediators or arbitrators be a licensed attorney. It appears to only require 30 hours of classroom study in mediation. It is my judgment that legal cases cannot be competently handled by a non-lawyer. It would be impossible for non-lawyers to adequately evaluate and handle cases without knowledge of the law of the case.

2. The final report recommends that attorney fees may be awarded if one does not improve its position from an arbitration award. This recommendation would cause an increase in litigation costs and prevent a party from its right to a jury trial.

I respectfully request that the Minnesota Supreme Court consider an order that all cases must be heard by a licensed attorney and that any award by an arbitrator exclude attorneys' fees, costs and disbursements and interest.

Respectfully submitted,

David B. Orfield,
President of CDR

GRANNIS, GRANNIS, HAUGE, EIDE, ANDERSON & KELLER, P.A.

Attorneys and Counselors at Law

PAUL H. HAUGE
VANCE B. GRANNIS, JR.*
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MICHAEL J. MAYER
DEBRA E. SCHMIDT
BARRY L. WITTENKELLER
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VANCE B. GRANNIS, SR.
Of Counsel

+Also admitted in Iowa and Nebraska

November 10, 1993

Mr. Frederick Grittner
Clerk of Appellate Court
245 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Dear Mr. Grittner:

Enclosed please find for filing twelve copies of the Statement of Kevin W. Eide regarding the Petition of Minnesota State Bar Association to Amend the Rules of the Client Security Board.

Very truly yours,

GRANNIS, GRANNIS, HAUGE, EIDE,
ANDERSON & KELLER, P.A.

BY: Kevin W. Eide
Kevin W. Eide

KWE/th
Enclosure

STATE OF MINNESOTA
IN SUPREME COURT
NOS. C9-81-1206 & C0-85-2205

IN RE: AMENDMENT OF THE RULES OF THE SUPREME COURT FOR REGISTRATION OF ATTORNEYS AND RULES OF THE CLIENT SECURITY BOARD

Kevin W. Eide, hereby files this Statement to support the Petition of the Minnesota State Bar Association to amend the Rules of the Client Security Board. This Statement is also filed to request the Court to clarify and supplement the subject matter of the Petition by:

1. Providing that the proposed new Rule 3.14(c) of the Rules of the Minnesota Client Security Board, providing for a $100,000 maximum payment per claim be effective for all claims pending at the date of the Petition or thereafter filed; and

2. Providing for discretionary judicial review in cases of Client Security Board denial of substantial claims.

I have received and reviewed the Statement of William J. Wernz in support of these same positions. I know that the Supreme Court is familiar with the service of Mr. Wernz to the State in the areas of Professional Responsibility and Ethics. Mr. Wernz is obviously familiar with the MSBA proposal. I urge the Court to adopt the proposals and arguments set forth in the Statement of William J. Wernz.

I am representing Ms. Eileen Zimmerman in her claim made to the Client Security Board, in claims made in Hennepin County District Court for judgment against Dennis John Morgeson, Sr. and Bruce Wyant and in claims made against a company, TLDI, in which Mr. Morgeson and Mr. Wyant maintained ownership interests and managerial control, and through which Mr. Morgeson and Mr. Wyant arranged many of the loans from their investors. Ms. Zimmerman obtained Notes of the loans which she made which were personally guaranteed by Mr. Morgeson and Mr. Wyant. These loans total $210,000. In addition, $22,750 is currently owing in interest on these loans.

Ms. Zimmerman is also widowed. Much of the money invested, her entire retirement savings, was obtained from monies left to her by husband and her parents. She is left with little or no savings. This money was taken from her upon assurances of its security and through outright deceit. It is my belief that Ms. Zimmerman has no other collectible legal recourse for the vast majority of the monies loaned.

I strongly urge this Court to do whatever it can to increase the maximum amount recoverable by claimants and to do so effective for those who have Petitions currently pending before the Board.

Thank you for the opportunity to be heard through this Statement.

Dated: November 10, 1993

GRANNIS, GRANNIS, HAUGE, EIDE,
ANDERSON & KELLER, P.A.

BY: Kevin W. Eide

Kevin W. Eide
Attorney for Eileen Zimmerman
1260 Yankee Doodle Road, #200
Eagan, MN 55121-2201
(612) 456-9000
Attorney I.D. No. 26153

November 8, 1993

Mr. Frederick Grittner
Clerk of the Appellate Court
245 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Minnesota State Bar Association Petition

Dear Mr. Grittner:

Please find enclosed the original and 12 copies of my Statement and Request to Make an Oral presentation at the November 17, 1993 hearing on the referenced Petition.

Very truly yours,

Robert R. Mockenhaupt

Robert R. Mockenhaupt
907 West Minnehaha Parkway
Minneapolis, Minnesota 55419

STATE OF MINNESOTA
IN SUPREME COURT
Nos. C9-81-1206 & CO-85-2205

In re:

Amendment of the Rules of the Supreme Court for Registration of Attorneys and Rules of the Client Security Board

REQUEST TO MAKE AN ORAL PRESENTATION

Robert R. Mockenhaupt hereby files this Request to Make an Oral Presentation to support the Petition of the Minnesota State Bar Association to amend the Rules of the Client Security Board. I will speak representing myself and six other clients who have been damaged, each at different levels, by the dishonest actions of the law firm that formerly represented each of us.

My presentation will address each of the following:

- Endorsing the Petition to extend the maximum payment per claim of the Client Security Board from $50,000 to $100,000,
- Requesting that the extended maximum payment of $100,000 be effective for all pending claims as well as future claims,
- Endorsing a discretionary judicial review in cases of Client Security Board denial of substantial claims.

Thank you for considering this request.

November 6, 1993

Robert R. Mockenhaupt
907 W. Minnehaha Parkway
Minneapolis MN 55419
(612) 824 - 9349

STATE OF MINNESOTA
IN SUPREME COURT
Nos. C9 - 81 - 1206 & CO - 85 - 2205

In re:

Amendment of the Rules of the Supreme Court for Registration of Attorneys and Rules of the Client Security Board

STATEMENT OF ROBERT R. MOCKENHAUPT

Robert R. Mockenhaupt hereby files this Statement to support the Petition of the Minnesota State Bar Association to amend the Rules of the Client Security Board.

This Statement is filed to request the Court to positively consider each of the following:

- Endorsement of the Petition to extend the maximum payment per claim of the Client Security Board from $50,000 to $100,000, and
- That the extended maximum payment of $100,000 be effective for all pending as well as future claims, and
- Acceptance of a discretionary judicial review in cases of Client Security Board denial of substantial claims.

THE COURT SHOULD ALLOW $100,000 PER CLAIM

With increasing frequency, I am aware of cases of client losses due to lawyer dishonesty considerably exceeding $50,000 and occasionally considerably exceeding $100,000. I fully recognize that the Client Security Board cannot be in a position to compensate clients for all their losses, but I also believe it is worthy to recognize the realities that these situations do in fact occur.

I and ten other former clients of D. John Morgeson and Bruce P. Wyant are in exactly that condition. Since I believe that most of the other clients will file a statement on their own behalf, I will not speak for them but only for myself. I had known and trusted these two lawyers for many years,

respected their advice, and followed their guidance not only in legal matters, but also in financial matters.

It was only in February of this year that I fully recognized that the financial assets that I had entrusted to them had not been managed for my best interests but had instead been confiscated by my lawyers and completely spent by them. The magnitude of my losses including legal fees is approximately $496,000, an amount greatly in excess of the $100,000 limit you are presently considering.

I must tell you in all honesty that raising the Client Security Board limit to $100,000 will not, in itself, restore my faith and trust in the legal profession. I have been seriously damaged by my former lawyers. But I also must note that the petition before you was submitted by the Minnesota State Bar Association, an organization of lawyers who are clearly attempting to recognize that their profession is too often under siege by its own members, and are trying to restore public confidence by an increased commitment of their personal financial resources.

I do not write this statement because I am attempting to recoup my $496,000, or $100,000 or $50,000. The amount of money is certainly important, but of less consequence than the public perception of your profession, a perception that is too often viewed as "shady" or "crooked" when in fact, the profession is mostly lawyers who are honest and hard working craftsmen. I applaud this effort of the Minnesota State Bar Association to elevate this public perception.

I am retired and widowed. I have a retirement income that allows me to be comfortable. Whatever decision you make regarding the Client Security Board limit will not force me into poverty or elevate me to wealth, but I do ask you to acknowledge positively this introspective effort of the Minnesota State Bar Association.

RAISING THE CLIENT SECURITY BOARD LIMIT SHOULD RECOGNIZE ALL PENDING CLAIMS AS WELL AS FUTURE CLAIMS

The purpose of paying claims from the Client Security Board is to assure that there is a public acceptance of the activities of the legal profession. Implicit in this acceptance is the need for credibility. If the Court were to conclude that claims filed with the Court should only be paid at the higher level from the date of the determination, all of the pending claims prior to

that date would effectively be penalized and a key criterion for raising the Board's limit would be in question.

I urge the Court to positively consider all pending claims as part of any increase in the claim limit for the Client Security Board.

THE COURT SHOULD ALLOW DISCRETIONARY JUDICIAL REVIEW OF BOARD DENIALS OF SUBSTANTIAL CLAIMS

I fully recognize that reimbursement of losses by the Client Security Board is discretionary and not a right of any client. I believe there are situations where, either because the client is unable to adequately articulate the situation they have, or the Board does not properly understand the rationale for the claim, the Board's conclusion is a denial of the claim. I have no expectation that the Board would act either capriciously or arbitrarily, but I do believe there are situations where clients have considerable funds involved and the Board denies claims for reimbursement, and in those cases there should be a review process by the Supreme Court.

CONCLUSION

I respectfully request the Court to adopt the petition of the Minnesota State Bar Association to increase Client Security Board limits to $100,000, to assure that all pending claims as well as future claims are included in this revised limit, and where large and controversial claims are denied that the Court provide a discretionary review of the findings of the Board.

Dated: November 7, 1993

Robert R. Mockenhaupt
907 W. Minnehaha Parkway
Minneapolis, MN 55419

American Family Insurance Group

Northwest Region

Office Of Regional Counsel
Jim Kremer, Regional Counsel

6131 Blue Circle Drive
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612-933-9753 Ext. 66901
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November 12, 1993

Mr. Frederick Grittner
Clerk of Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Proposed Rules for ADR

Dear Mr. Grittner:

What follows is one of my concerns about the new rules for ADR. I am putting my concerns in writing and would like to speak to that issue on November 17.

Rule 114.09 (e)(4) is, as I am sure the drafters understand, a substantial change in Minnesota Law. One could cite pages of Minnesota cases which argue against awarding attorney fees in all but the narrowest of circumstances. I do not, however, oppose this rule simply because it is a major expansion of Minnesota Law but rather because it provides no direction and cannot be applied in an evenhanded way.

These two difficulties are perhaps most clearly seen in personal injury cases. On the one hand it is hard to imagine any court ordering a defeated plaintiff to pay attorney fees to the defendant's attorney whose fee the court knows has already been paid. Conversely, courts will find it easy to order defendants to pay because the court knows such payments will not generally come from the named defendant but from her insurer. Rule 114.09 (e)(4) cannot and will not be enforced in an evenhanded manner.

The second problem is that when courts order such payments there are no guidelines or parameters. It is easy to imagine courts just enhancing verdicts by an additional one-third if the plaintiff wins and ignoring the rule when the defendant wins.

It seems to me the goal of this rule is to encourage settlements by providing one more risk to the parties. This rule provides such a risk to just one party and thus is not only unfair but will not produce the desired results.

Sincerely,

Jim Kremer
Regional Counsel

JK/lkk

STATE OF MINNESOTA
IN SUPREME COURT
C5-87-843

In re: Hearing to Consider Proposed Alternative Dispute Resolution Rule for the Minnesota General Rules of Practice

STATEMENT OF MARC M. BERG

INTRODUCTION

I am an associate attorney in a small law firm in downtown Minneapolis. I have been licensed to practice in the State of Minnesota for three years. Below are my thoughts on the proposed Alternative Dispute Resolution Rule for the Minnesota General Rules of Practice. I would have liked to make an oral presentation on November 17, 1993, but I have a conflict with another matter.

DISCUSSION

I strongly support the use of alternative dispute resolution (ADR) as a means of resolving cases in the district court system, so long as ADR does not impose substantial additional expenses upon litigants who otherwise have the right to seek redress through the judicial process. There are already enough financial barriers to bringing a case to district court, including attorney's fees, filing fees, service of process fees, court reporter fees, expert witness fees, costs of photocopying, postage, trial exhibits, certified records, etc. The addition of costly ADR procedures could be abused by the well-leveraged, institutional litigants who refuse to settle cases on fair terms, thereby defeating the one of

the important purposes of ADR, which is to provide speedy but fair justice to all parties.

For this reason, I would support the proposed ADR rules only if the new rules include language which acknowledges the very real disparity of wealth and bargaining power between individual and institutional litigants, and include appropriate procedural safeguards against any attendant abuses. In personal injury cases, for example, the defendant is usually sponsored by a multimillion (and sometimes multibillion) dollar insurance company, with virtually unlimited willingness to spend the insured's money on defense costs. The plaintiff, on the other hand, is usually a private individual, who often lives a paycheck-to-paycheck (or disability check-to-disability check) existence, and is therefore forced to pay the attorney's fees and expenses at the conclusion of the representation out of any recovery. In such cases, nothing can stop the defense from appearing at an arbitration or mediation and refusing to settle. The defense can do this as a shrewd way of saying that the judicial process exists not for the injured individual plaintiff, but for the powerful institutions that defend injury claims simply as a cost of doing business.

In my experience with ADR, I have been able to resolve some difficult cases, but I have also encountered situations in which insurance companies or other big corporations have appeared at an arbitration, but then failed to negotiate in good faith. I think these litigants have done this to make a point, or to wear us down. When a well-financed, institutional defendant such as an insurance

company knows that the ADR cost poses an obstacle for an individual plaintiff, the defense can use this disparity as a negotiating weapon. Ostensibly, the defense knows that short of execution of an unstayed judgment, no one can force the defense to part with settlement money, regardless of any level of encouragement from an arbitrator or mediator. At this point, each side could have incurred something up to or in excess of $1,000.00 in various fees, which may be mere pocket change to the defense, but could be unbearable to the plaintiff.

While I do believe that we should encourage ADR, I am against any process in which referral to ADR amounts to nothing more than an additional, inflated filing fee. In my opinion, the way to prevent this from happening is to modify proposed Rule 114.11 to read as follows:

(a) The neutral and the parties will determine the fee.

(b) The parties shall pay for the neutral. It is presumed that the parties shall split the costs of the ADR process on an equal basis. The parties may, however, agree on a different allocation. Where the parties cannot agree, the court retains the authority to determine a final and equitable allocation of the costs of the ADR process. In allocating the costs of the ADR process, the court shall take into account the relative financial abilities of the parties to bear such costs, and in no event shall the court allocate the costs of the ADR process in a manner which would effectively deny a party of the opportunity to proceed to district court. Any party who has been granted permission to proceed in forma pauperis shall be excused from paying any of the costs of the ADR process.

(c) Subject to the provisions of subparagraph (b), if a party fails to pay for the neutral, the court may, upon motion, issue an order for the payment of such costs and impose appropriate sanctions. If the court finds, upon motion, that a party has used the ADR process as a means to delay, harass, or burden an opponent, or otherwise has failed to participate in the ADR process in a manner consistent with

good faith efforts to resolve the dispute, the court may order that party to pay the entire cost of the ADR process, or the court may impose any other appropriate sanction.

As to subparagraph (b), I have particular difficulty with the presumption that the parties should split the ADR costs on an equal basis, especially in cases when there is so much financial inequality between the parties. If the parties are on an equal footing, they should share the expense equally, but if they are not, the district court judges should be told to take this into account. Accordingly, the rule should specifically mandate that the courts examine the relative financial strengths of the parties when allocating the ADR costs. Also, it should go without saying that a party who is proceeding in forma pauperis is, by definition, unable to bear any of the added costs presented by ADR.

As to subparagraph (c), I think that the court's authority to sanction a party for failing to pay for a neutral or other ADR costs should be expressly subordinate to the district court judge's determination of that party's financial status. The reason is that there are some people who will be unable to pay for ADR without incurring substantial personal hardship. The system exists for these people, too, and the Supreme Court should avoid promulgating any rules which will result in sanctions being enforced only against those parties who are least able to bear them.

More importantly, I think the district court judges should have express authority to review the ADR process to see if any of the parties have abused it, or otherwise have failed to approach it as a serious method for the fair resolution of the case. In

fact, while the proposed rules appear to set up workable procedures for ADR, none of the proposed rules readily reflect the stated policy of "resolving disputes more efficiently, at less cost, and with greater satisfaction to the parties while assuring that the processes guarantee fundamental fairness and promote the goals of effective and efficient justice." I think that this is the place to do so, by saying that there will be penalties if the district court judge finds, upon motion, that someone has misused ADR.

Regardless of the exact language used, the rules need to embody the idea that those litigants who use ADR correctly will be rewarded, while those litigants who abuse the process will be punished. An analogy may be made to the Offer of Judgment procedure in Minn. R. Civ. Proc. 68, which is also designed to encourage settlement. The basic premise of Rule 68 is that if a defendant puts a reasonable settlement offer on the table, the defendant will either (1) see the case settled, or (2) have the burden of paying costs and disbursements shifted onto the plaintiff. On the other hand, if a plaintiff rejects a reasonable Rule 68 settlement offer, the plaintiff will be required to pay the defendant's costs and disbursements. The key, of course, is that the settlement offer must be <u>reasonable</u>. By the same token, there should be a similar system of predictable rewards and punishments to encourage the good faith use of ADR.

I anticipate that any opponents of the language I have proposed will offer two arguments against the basic point I am trying to make. First, many will say that because the plaintiff

decided to bring the suit, the plaintiff tacitly agreed to bear all attendent expenses, and should not be heard to complain if she is serious about pursuing her claim. I frequently hear words to this effect from trial court judges and defense attorneys, to which I often respond that the plaintiff never decided to be injured in the first place. Second, many will say that the plaintiff can simply pay the cost of ADR out of the recovery, so the plaintiff does have the means of paying for ADR. The problems with this argument are that (a) it assumes that settlement will occur either at the ADR or shortly thereafter, and (b) the plaintiff has already committed to paying all of the other costs of the litigation out of the recovery, including the initial filing fee, and should not let the defense use the ADR cost as a bargaining chip in arriving at the ultimate settlement amount.

CONCLUSION

My understanding of the General Rules of Practice are that they are meant to be an extension of the Minnesota Rules of Civil Procedure. For this reason, the same underlying policy should govern the operation of the proposed ADR rules. Recall that Minn. R. Civ. Proc. 1 states that the rules "shall be construed to secure the just, speedy, and <u>inexpensive</u> determination of every action." An added ADR process will result in "inexpensive" determination only if ADR does not result in excessive or duplicative costs. As recent statistics from the ABA show that approximately half of the public cannot afford to pay for the services of a lawyer, it's

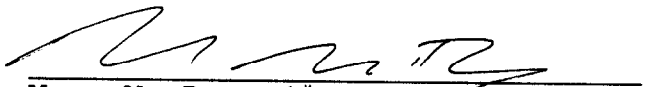
likely that a large segment of the public would be burdened by the added expense of ADR.

The goal of getting more cases resolved more quickly and out of the system is a good one, but we should never forget for whom the system exists: not for the lawyers, not for the judges, and for not the court personnel, but for the public, and especially for those members of the public who are faced with the choice of either resorting to the system or giving up their rights. For this reason, I would urge the court to decline to adopt proposed Rule 114.11 in its present form, or, for that matter, any other rule which ultimately creates an uneven ADR playing field.

RESPECTFULLY SUBMITTED,

SELMER LAW FIRM, P.A.

Dated: Nov. 12, 1993



Marc M. Berg (# 20979x)
Suite 850
920 Second Avenue South
Minneapolis, MN 55402
Telephone: (612) 338-1312

November 9, 1993

Mr. Frederick Grittner
Clerk of Appellate Courts
245 Judicial Center
25 Constitutional Avenue
St. Paul, Minnesota 55155

Re: Proposed Alternative Dispute Resolution Rules for the Minnesota General Rules of Practice

Dear Mr. Grittner:

Please consider this a request by the Minnesota Defense Lawyers Association (MDLA) to make an oral presentation at the hearing to consider the proposed Alternative Dispute Resolution Rule which hearing the court has scheduled for November 17, 1993, at 1:30 p.m., in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center. Mr. Eric J. Magnuson, of the law firm of Rider, Bennett, Egan & Arundel, will appear and speak on behalf of this Association at that hearing.

This letter is also intended to serve as MDLA's statement of its position with regard to the proposed Rules. Specifically, MDLA is very concerned with Rule 114.09 Arbitration Proceedings, (e) Trial After Arbitration, Subd. (4), which reads:

> "If the party filing a demand for trial does not improve its position, any other party may move the court for payment of costs and disbursements, including payment of attorney and arbitrator's fees."

The adoption of this Rule represents a major shift from current procedures and, to the best of our knowledge, is not a part of any current ADR Rules. The adoption of this Rule would, in our opinion, result in a chilling effect on a party's right to trial by jury. The constitutionality of the adoption of such a Rule is an open question. A person should not be punished for exercising a constitutional right. That issue aside, the fairness of depriving a litigant of a jury determination on the merits in favor of the determination by one individual is questionable. Fairness of the system should not be sacrificed under the guise of efficiency. And, a litigant's faith in the system is not expendable in favor

MINNESOTA DEFENSE LAWYERS ASSOCIATION

MDLA

205 National City Bank Building
510 Marquette Avenue
Minneapolis, MN 55402

(612) 338-2717

EXECUTIVE DIRECTOR
Janet Blomberg Soule

of speed and reduction of costs. To place a litigant into a position where the right to a jury trial can only be exercised by risking a substantial penalty in attorney's fees and costs if he or she should be unsuccessful is to make jury trials less available to litigants. It will also, we believe, result in a system that will make the outcome in a particular case more dependent upon the personal background and bias of one individual rather than the equalizing effect of the mix provided by a jury of one's peers.

Adoption of this rule would be contrary to established common law. This court has consistently rejected arguments presented to it that attorneys' fees should be awarded to a prevailing party in civil litigation. "For over 100 years, the law in Minnesota has been that, absent a contractual agreement or statute, a party cannot collect attorneys' fees. See Frost v. Jordan, 37 Minn. 544, 546, 36 N.W. 713, 714 (1887) (it is against the analogies of the law to allow expenses of litigation beyond the costs allowed by statute, which, as said before, however inadequate, are the measure of indemnity which the law provides)." Garrick v. Northland Insurance Company, 469 N.W.2d 709, 713 (Minn. 1991). See also Justice Simmonett's concurring opinion in Church of the Nativity v. WatPro, 491 N.W.2d 1 (Minn. 1992).

The policy reasons behind this rule have been examined in a variety of contexts. This proposed provision in the rules for alternative dispute resolution will run directly contrary to that long-established rule of law. If adopted, the provision with regard to attorneys' fees will clearly result in a significant disincentive to submit to even non-binding arbitration, if one result may be a significant increase in a client's exposure. This is a fundamental change in the rule of attorneys' fees, that should be dealt with directly. In effect, there will now be a rule in all civil litigation that the "winner" gets attorneys' fees, with only the definition of what is "winning" being changed.

An additional consideration is that, as a practical matter, in a substantial portion of the cases, the Rule would operate only to restrict defendants who are either solvent or insured from seeking jury trials while having little or no deterrent effect on plaintiffs or uninsured or insolvent parties. It is no secret that the assessment of costs, disbursements and attorney's fees against the majority of plaintiffs pursuing personal injury claims or other parties who are uninsured or insolvent results in an uncollectible judgment. A party who is judgment proof can request a jury trial without any real fear of the financial consequences. On the other hand, parties who are insured or financially solvent will be placed at a disadvantage in requesting jury trials since their insurance or their own assets will be on the line to pay for the costs, disbursements and attorney's fees that are assessed as a result of this Rule. As a practical matter, the application of such a Rule would result in a basic unfairness to the system and a bias against insured or solvent parties.

Apart from common law and fairness considerations, the proposed Rule is very poorly drafted. What is meant by "If the party . . . does not improve its position?" In the framework of the complex litigation

currently taking place in our courts, what is and is not an improvement in position is not clear. Further, what costs, disbursements and attorney's fees are to be awarded? Are these the costs, disbursements and attorney's fees in connection with the arbitration; the costs, disbursements and attorney's fees for the entire litigation; or just those incurred in proceedings after arbitration? Also, must such costs, disbursements and attorney's fees be reasonable and, if so, who decides what is reasonable?

The proposed Rule is fraught with problems relating to long established common law, fairness and definitional deficiencies. MDLA does not think that the Rule is necessary for the successful implementation of alternative dispute resolution principles in Minnesota. The Rule is obviously proposed for the purpose of deterring a litigant from exercising his or her right to request a jury trial. As such, the Rule is contrary to one of the basic precepts of our judicial system, i.e., the court system should be equally available to all.

For the reasons stated above, the Minnesota Defense Lawyers Association recommends that proposed Rule 114.09(e), Subd. (4), not be adopted as part of the Alternative Dispute Resolution Rules for the Minnesota General Rules of Practice. The court's consideration of this Association's recommendation is appreciated.

Very truly yours,

MINNESOTA DEFENSE LAWYERS ASSOCIATION

Dale B. Lindman
President

DBL/sf

cc: Mr. Eric Magnuson
Board of Directors
Executive Committee

MINNESOTA CLIENT SECURITY BOARD
520 LAFAYETTE ROAD
SUITE 100
ST. PAUL, MINNESOTA 55155-4196

TELEPHONE (612) 296-3952
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NANCY B. VOLLERTSEN
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SANDRA M. BROWN
EARLE F. KYLE, IV
KIM BUECHEL MESUN
RONALD B. SIELOFF

MARCIA A. JOHNSON
DIRECTOR

MARTIN A. COLE
ASSISTANT DIRECTOR

November 12, 1993

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

Re: In Re MSBA Petition for Amendment of the Rules of the Supreme Court for Registration of Attorneys and Rules of the Client Security Board.

Dear Clerk:

Enclosed please find the original and twelve copies of the statement of Nancy Brostrom Vollertsen, Chair of the Minnesota Client Security Board, and her request to make an oral presentation at the hearing in the above matter.

Very truly yours,

Marcia A. Johnson
Director

By Martin A. Cole
Martin A. Cole
Assistant Director

tt
Enclosures
cc: Honorable Sandra Gardebring
Nancy Brostrom Vollertsen

FILE NOS. C9-81-1206 & C0-85-2208

STATE OF MINNESOTA

IN SUPREME COURT

In Re Amendment of the Rules of the Supreme Court for Registration of Attorneys and the Rules of the Client Security Board

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REQUEST TO MAKE AN ORAL PRESENTATION

Nancy Brostrom Vollertsen, Chair of the Minnesota Client Security Board, files this request to make an oral presentation concerning the petition of the Minnesota State Bar Association to amend the Rules of the Client Security Board. The presentation will be in support of the petition and based upon the written statement filed along with this request.

Dated: November 10, 1993.

MINNESOTA CLIENT SECURITY BOARD
520 Lafayette Road, Suite 100
St. Paul, MN 55155
(612) 296-3952

By Nancy Brostrom Vollertsen
NANCY BROSTROM VOLLERTSEN, CHAIR
Attorney No. 12266X
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FILE NOS. C9-81-1206 & C0-85-2208

STATE OF MINNESOTA

IN SUPREME COURT

In Re Amendment of the Rules of the Supreme Court for Registration of Attorneys and the Rules of the Client Security Board

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WRITTEN STATEMENT OF NANCY B. VOLLERTSEN ON BEHALF OF THE MINNESOTA CLIENT SECURITY BOARD

Nancy B. Vollertsen, Chair of the Minnesota Client Board, files this statement on behalf of the Client Security Board. The Board has reviewed the petition of the Minnesota State Bar Association (MSBA) for amendment of the Rules for Registration of Attorneys and the Rules of the Client Security Board. The Board has also reviewed the report of the Client Protection Committee of the MSBA. The Board wishes to give its support to the MSBA's petition and request the Court to adopt its recommendations with some very minor clarifications.

The Client Security Board has been an active participant in this review process by the MSBA. Melvin Orenstein, Board Chair until June 1993, was a member of the MSBA Committee. Marcia Johnson, Client Security Board Director, Martin Cole, Assistant Director and William Wernz, former Director, all appeared before the committee and provided their input. Mr. Cole, as Board staff, also provided statistical and financial information to the committee upon their request. In addition, Kim Buechel Mesun, a current Client Security Board member, appeared before the committee in her capacity as co-chair of the MSBA Public Law Section. Thus, the Board has been well represented both on and before the MSBA committee.

The Board is appreciative of the MSBA committee's work and the general finding by the committee that the Board is functioning well and is not in need of

any major overhaul. The Board has discussed the changes which the committee has proposed and supports the recommendations subject to some very minor clarifications which will be discussed below. The MSBA has recommended two changes to the Client Security Board Rules and one change to the Rules for Registration of Attorneys which concerns the collection of the assessment for the Client Security Board. Each of those three matters will be discussed separately.

I. RULE 3.14(c).

The MSBA has recommended that a new subdivision (c) be added to Rule 3.14 of the Rules of the Minnesota Client Security Board, to provide a maximum payment of $100,000 to a claimant for a single claim. Currently, the Board limits payment on any one claim to $50,000. This has not been codified as a rule, but was established as Board policy at its February 22, 1988, meeting.

To date, the Board has paid eight claims at its maximum amount of $50,000 where the claimant's actual loss was in excess of that amount. The Board's review of those eight matters indicates that five of those eight claims would have also exceeded a $100,000 maximum had that limit been in effect. The Board's review indicates that on those eight claims an additional $282,444 would have been paid had a higher limitation been in effect, which would average to $47,074 per year in additional payments over the six year history of the Board. Based on this statistical information, and assuming that a similar pattern of claims will continue in the future, the Board believes that it can handle the higher cap, assuming assessments do not decrease.

Certainly a major goal of any Client Security Fund should be as close to total reimbursement to all victims of attorney theft as possible. Although even a $100,000 maximum will not totally reimburse certain victims, the Board believes it is appropriate to raise the limit as long as its income and budget allows. Should some catastrophic loss situation (*for example,* numerous large claims against one attorney in a very short period of time) occur, the MSBA's proposed rule appears to still

allow the Board discretion to pay a lesser amount if necessary or to carry over payments on certain claims to a later fiscal year. It thus appears to the Board that the MSBA's recommendation is appropriate, is workable and should be adopted.

There remains a minor issue on this point concerning when such a higher limitation will take effect. The Board is aware that certain claimants who already have claims pending before the Board are particularly interested in this aspect of the matter. The Board has already submitted budgets to the Court for FY94 and FY95 based upon payment projections with a $50,000 maximum payment. If the maximum payment is raised prospectively, future budgets will take this into account. If the maximum amount is applied retroactively to claims already pending before the Board, however, revised budgets would have to be provided to the Court for its approval for the current and next fiscal year. We are also concerned with the equity toward claimants whose claims have already been approved at the $50,000 discretionary limit if this rule were applied retroactively by the Court. Thus, unless the Court directs the Board otherwise, it is the Board's understanding that any rule change would be applied only prospectively to claims filed after the effective date of the rule change.

II. RULE 3.14(d).

The MSBA has also recommended that the Board, in its discretion, be allowed to award interest on a claim from the date of filing, at the judgment interest rate. This proposed change by the MSBA is not one which the Board had itself considered or put forward to the committee during its consideration. Nevertheless, the Board supports the MSBA's recommendation.

The Board understands the MSBA's recommendation will authorize the Board, only after determining the payable value of a particular claim, in its discretion to award interest on that payable amount from the date the claim was filed if the Board finds there are circumstances (such as a delay not caused by the claimant) which warrant such an award. If this is the basis for the MSBA's request,

the Board urges the Court to adopt this change as appropriate as long as discretion remains with the Board to make such an award. The Board would like to be clear, however, that this rule change is not intended to amend Rule 3.02(a), which excludes lost "interest" prior to filing from payment by the Board.

III. RULE 2, RULES FOR REGISTRATION OF ATTORNEYS.

Finally, the MSBA petition recommends changes in the assessment which is collected in favor of the Client Security Fund as part of the attorney registration fee paid by all licensed Minnesota attorneys. Although the petition does not actually request this, based upon the MSBA committee report, the Board understands that the MSBA's petition is intended to change the assessment to $20 per year per attorney for all attorneys beginning with the first year of licensure, thus eliminating the distinction currently in effect for attorneys during the first four years of their practice. Attorneys during the first four years of practice currently pay $100 towards the Client Security Fund ($50 in year one and $50 in year four), then begin paying $20 per year in the fifth year of practice. The proposed change would have those attorneys now pay $80 over those first four years rather than $100, resulting in a slight decrease in income for the Client Security Fund.

Based on the Board's current budget projections, this decrease in income, combined with the slight decrease in interest income which would also result, would result in approximately $15,000 per year less income. Even combined with the additional $47,074 per year in additional claim payouts which would result from raising the maximum payment (*see* I. above), the Board believes that this change is appropriate and manageable. The two changes would result only in a slower growth for the Fund. The Board thus urges the Court to adopt this portion of the MSBA's proposal.

The other portion of the MSBA's proposal on this point would be to make the $20 a year assessment permanent, rather than having it end at the end of FY95 (June 30, 1995) as is currently established by Court order. The MSBA proposes that

the fund be allowed to grow until it reaches approximately $2.5 million, at which point the Client Security Board would advise the Court of this fact and the Court could suspend collection of the assessment.

Again, the Board wishes to note that it was not the Board's recommendation to the committee that the Fund be allowed to grow to this level. The Board has always believed that a fund in the range of $1 million to $1.5 million is generally adequate to protect the public absent some emergency situation. The Board has always understood that, given such an emergency, it could petition the Court for additional assessments. While the Board does not oppose the MSBA's request, should the Court believe that a somewhat lesser amount be employed as a trigger mechanism for suspension of the assessment, such as $1.5 million, the Board would support such a recommendation.

IV. CONCLUSION

As discussed above and with the minor clarifications indicated by these comments, the Minnesota Client Security Board respectfully urges the Court to adopt the proposed rule amendments of the MSBA.

Dated: November 10, 1993.

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

C5-87-843

WRITTEN STATEMENT OF FRED H. PRITZKER, PRESIDENT, MINNESOTA TRIAL LAWYERS ASSOCIATION

Thank you for the opportunity to offer this statement regarding proposed ADR Rules.

The Minnesota Trial Lawyers Association and its members are strong supporters of ADR. Our members frequently serve as mediators and arbitrators and have received extensive formal training in the ADR process. We, along with the MDLA, have formed our own independent ADR company, which is fast becoming one of the best and most frequently used in the state.

It is precisely because of our experience with and belief in arbitration and other forms of ADR that we generally support enactment of these rules with the exception of proposed Rule 114.09(e)(4).

Arbitration works only if it is truly voluntary. If parties feel that sanctions, real or perceived, apply, there will be less likelihood of widespread participation. Judges will realize this too and will be less inclined to order arbitration if the parties object to it. If the parties are ordered to arbitration against their wishes and sanctions apply, there will be institutional pressure to end its use. Inevitably, proposed Rule 114.09(e)(4) will decrease the use of arbitration.

Arbitration's stated benefit has always been that it is less expensive and less time consuming than trial. Again, if sanctions apply, and the award of costs, disbursements and attorneys' fees are clearly sanctions, the parties are going to spend that much more time and expense in arbitrating cases. It is very likely that soon arbitrations will resemble jury trials in every respect except for the jury.

Other practical problems abound. Plaintiff lawyers handling personal injury cases rarely keep track of their time. Defense lawyers almost always do. How are fees to be calculated? Are those fees to be left to the discretion of the judge? What if there is a consistent discrepancy between how and when these sanctions are to be applied? Will the award of fees, for example, bear any resemblance to the actual fees incurred? This lack of certainty in the amount and frequency of the imposition of these sanctions leads very directly to the possibility of abuse.

There is an inherent imbalance in resources among parties to a personal injury lawsuit. The actual and perceived cost of the imposition of sanctions to an insurance company is far different than it is to an individual litigant. This threat goes up in direct proportion to the size of the case.

The talent and experience of arbitrators vary. It has been my experience that arbitrators assigned by the courts in personal injury cases occasionally have no idea about the reasonable value of a case. Obviously, juries don't either, but those same juries are the beneficiaries of more extended evidentiary presentations, jury instructions and the like. In this regard, there is no showing or data to suggest that an arbitrator's findings correlate with actual jury results. If this is true, we are creating an artificial claims resolution system that may or may not mirror the "reality" of a jury trial. This also carries with it the risk of an "elitist" substitute for

substitute for the wisdom of six people who more closely represent a cross section of the general population.

I realize, in response to the above, that people will say "No one is infringing upon anybody's Seventh Amendment right to a jury trial." But that's exactly what is happening. In that regard, it is not unlike poll taxes, literacy requirements, and the like. When the exercise of a constitutional right becomes encumbered with costs or tests or other impediments, that right is inevitably denied.

There is also no empirical data to suggest that the rule would ever accomplish its implied purpose: to discourage frivolous appeals or to lessen the perceived court backlog. In other words, there is no data to suggest there is a problem that needs correcting; it is a solution in search of a problem.

The proposal also breaks new ground. I am not aware of any other rule now in existence in Minnesota that imposes these sanctions on a party appealing from an arbitrator's decision who does not better his or her position at trial.

Our members are also suspicious of the timing for this proposed rule. The so-called English Rule was one of the Willie Horton issues in the last presidential campaign (i.e., no factual validity, portrayed in an emotional manner to advance the agenda of the political Right).

In summary, while we generally support enactment of these proposed rules, we object to the implementation of Rule 114.09(e)(4) because there is no data suggesting it is necessary, it will not work, it impairs constitutional rights, it will not be applied consistently, and will likely cause arbitration to be used less.

FRED H. PRITZKER

Dated: November 8, 1993

3107 Farnum Drive
Eagan, Minnesota 55121

November 12, 1993

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

RE: Report of the Client Protection Committee

Dear Mr. Grittner:

While serving in our capacity as the Executive Council of the MSBA Public Law Section, we had the opportunity to review the Report of the Client Protection Committee dated January 29, 1993. We are writing to express our thoughts regarding that report. While we are in agreement with some of the Committee's recommendations, we have serious reservations about others.

While we agree that compensating aggrieved clients for losses resulting from attorney theft is an admirable goal, we believe that even more important is reducing the incidence of such losses. We also believe that the costs associated with compensating aggrieved clients should fall primarily upon those attorneys who handle client funds. Nearly all public, and many private, lawyers never handle client funds.

With respect to the Client Protection Committee (CPC) recommendations for the establishment of a $2.5 million reserve in the Client Security Fund and a permanent $20 annual assessment on all attorneys, we believe that a $2.5 million reserve appears to far exceed the reserve that other comparably-sized states have on hand. A $20 annual assessment also exceeds assessments of other comparable states. (See attached chart of ABA survey results.) The current $1 million reserve appears adequate. We also believe that attorneys with no access to client funds should not be assessed any additional annual fee to be paid to the Client Security Fund. Any additional assessments to the Client Security Fund should be based on an assignment of risk. To the extent firms and attorneys have access to client funds and have not taken appropriate measures to guarantee that attorney theft of those funds cannot occur, assessments to the Client Security Fund by those firms and attorneys should be high. As firms and attorneys individually put into place guarantees that attorney theft will not occur in their practice, their assessments should be reduced accordingly. Such a method of assessment would place the burden of future payments into the Client Security Fund on those attorneys whose clients are at risk of some day needing those funds.

Regarding the CPC recommendation of a $100,000 per claim cap, we believe that a cap on payments from the Client Security Fund defeats the purpose of the fund if that purpose is to make the aggrieved client whole. While there are practical aspects of a per claim cap, the existence of such a cap emphasizes the point that the Client Security Fund is of little use as a public relations tool for attorneys. The public does not hear about Client Security Fund repayments of stolen client funds. It only hears about the fact that these funds were stolen by an attorney, which mars the image of all attorneys, whether private or public.

The CPC recommendation to pay interest at the statutory rate on claims from the date of filing a claim with the Client Security Fund appears consistent with the goal of making the aggrieved client whole.

We support all measures taken to prevent attorney theft from occurring, and therefore support the CPC recommendations for attorney and public education regarding attorney theft and the Client Security Board.

We also support the CPC recommendation that law school classes on office management with specific emphasis on trust accounting be offered as an additional measure taken to prevent attorney theft from occurring.

Finally, we support the CPC recommendation that insurance company regulations be amended to require the notification of clients of payment of insurance settlements as an additional measure taken to prevent attorney theft from occurring.

As a general observation, we request that the Supreme Court, Client Security Board and MSBA constantly reexamine the troubling frequency of attorney theft and the underlying assumption that attorney theft will continue to occur at the rate of approximately $160,000 to $250,000 per year. The reserve of $2.5 million suggested by the Board appears to be based on that assumption. We believe that the Supreme Court, Client Security Board and MSBA should place more emphasis on prevention of attorney theft rather than accepting attorney theft as a fact of life and accounting for the costs of that theft. This accounting does not undo the damage done to the client and to all attorneys from the publicity generated when an attorney is involved in the theft of client funds. Hopefully, through increased efforts of the Supreme Court, Client Security Board and MSBA in the area of prevention of attorney theft, the need for a Client Security Fund with a $2.5 million reserve will be reduced.

Sincerely,

Patricia M. Buss
Assistant Dakota County Attorney on behalf of:

Kim Buechel Mesun
Allen Giles
Nancy McLean
Warren Sagstuen
John Stuart

Attachments

O:PL-CSF