

OFFICE OF
APPELLATE COURTS

JUN 25 1992

FILED

ANNUAL REPORT OF THE
MINNESOTA CLIENT SECURITY BOARD

CO-85-2205

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June 1992

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June 24, 1992

Fred K. Grittner
Clerk of Appellate Courts
Suite 245
25 Constitution Avenue
St. Paul, MN 55155

Re: Client Security Board Annual Report

Dear Mr. Grittner:

Enclosed for filing are eight copies of the Annual Report of the Minnesota Client Security Board.

The Board approved the report in June 1992.

Very truly yours,

Thomas C. Vasaly
Acting Director

By



Martin A. Cole
Assistant Director

:jd

cc: Honorable Sandra S. Gardebring (no enclosure)
Melvin I. Orenstein (no enclosure)

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I. OVERVIEW.

Rule 1.10, Minnesota Rules of the Client Security Board, provides:

At least once a year and at such other times as the Supreme Court may order, the Board shall file with the Court a written report reviewing in detail the administration of the fund, its operation, its assets and liabilities.

This fifth annual report of the Minnesota Client Security Board covers the period of the Board's fiscal year, from July 1, 1991, through June 30, 1992.

The principal Client Security highlight is the decline in the dollar amount of claims paid by the Board. The Board anticipates approval of approximately \$160,000 in claims by the end of the fiscal year, a marked reduction from past years.

The causes of this reduction, and whether it will be temporary, are unknown. Vigorous and prompt disciplinary action in misappropriation cases may well be a factor. Restitution by several attorneys who misappropriated funds has also been a factor in keeping claims down.

Another significant event of the past year in the client security field is the creation of an MSBA client protection committee, chaired by Merritt Marquardt. Board Chair Melvin Orenstein is serving on the committee, which is studying the Board and client security funding options. The committee anticipates making its report by the end of 1992.

The Board received a good deal of publicity this year in connection with the arrest and prosecution of Mark Sampson, a disbarred attorney who was responsible for \$404,672.02 in claims paid by the Board. Attached is an article about Sampson and the Board's work (Exhibit 1).

In its nearly five years of operation (through May 1, 1992), the Board has paid 114 claims, totalling over \$1.35 million. Ninety-eight claims have been denied by the Board (Exhibit 2).

The Board has promptly resolved the majority of claims for reimbursement which the Board received this year. The Board has approved twenty-one claims this year, as of May 1, and likely will approve approximately thirty claims by the end of the fiscal year. The Board anticipates that after its June 1992, meeting, fewer than 20 claims will be pending. Only three of the pending claims are more than nine months old, two of which are awaiting completion of protracted civil litigation. On average, the Board resolved claims within six months of their being filed.

Seventeen claims have been denied this year as not meeting the requirements for payment under the Board's rules. Almost all of the claims denied were malpractice/negligence claims, fee disputes, or were found to not arise out of an attorney-client relationship covered by the Board's rules.

The new \$20 annual assessment, collected as part of the attorney registration fee, produced approximately \$240,000 additional income for the Fund this year. The Fund also continues to receive two \$50 installments from young lawyers to fulfill the original \$100 per attorney obligation.

The Board anticipates a June 30, 1992, balance in the Fund of \$882,935, which is more than projected. Since claim payment accounts for approximately 90 percent of the Board's expenses, the increased balance is due to the reduced amount of claims paid. Depending on the amount of valid claims, long range budgets still forecast that the Fund will grow slowly over the next few years.

II. PROCEDURES OF THE CLIENT SECURITY BOARD.

The Board has been chaired by Minneapolis attorney Melvin Orenstein since its inception. The Board's liaison on the Minnesota Supreme Court is Justice Sandra Gardebring. The Office of Lawyers Professional Responsibility provides staff services to the Board for investigating claims and conducting Board meetings.

Board Members. The following individuals currently serve on the Board:

<u>Name</u>	<u>Term Expires</u>
Melvin I. Orenstein, Minneapolis	June 30, 1993
Bailey W. Blethen, Mankato	June 30, 1994
Sandra M. Brown, Minneapolis	June 30, 1993
Jean L. King, St. Paul	June 30, 1992
Ronald B. Sieloff, St. Paul	June 30, 1994
James B. Vessey, Minneapolis	June 30, 1993
Nancy B. Vollertsen, Rochester	June 30, 1992

Ms. King and Ms. Brown are public members. All other members are licensed attorneys.

Ms. Vollertsen is eligible for reappointment to another three-year term and recently was re-nominated by the MSBA. Ms. King, although eligible for another term, determined not to seek reappointment. Ms. King's insight will be sorely missed. The non-lawyer members make a major contribution to the Board's decision-making process. Sister Mary Madonna Ashton, former Commissioner of Health, was recently appointed by the Court to replace Ms. King.

Rules of the Minnesota Client Security Board. The rules took effect on July 1, 1987. To date, there have been no amendments to the Board's rules. The Board has already set aside its entire September 1992 meeting to review its rules and

consider possible amendments. The Board considers its five-year experience in applying its rules to be a sufficient basis upon which to recommend any changes. Mr. Orenstein and Mr. Vessey, both of whom have been involved with client security matters for many years, will be in their last year as Board members, so it is a particularly appropriate time to conduct such a review to take full advantage of their expertise. Other rule changes may be suggested by the MSBA study committee.

Funding and Budget Procedures. The Supreme Court approved a \$20 per year assessment on all attorneys in practice more than four years, which took effect on July 1, 1991. The first year of the new assessment will raise approximately \$240,000. At the end of this fiscal year, the Fund is projected to have a balance of approximately \$880,000. In FY92, the Fund also received approximately \$65,000 from the continuing assessments of new attorneys, who remain obligated to pay the original \$100 assessment. The Fund will also receive approximately \$57,000 in investment income this year. The Board does not handle any funds or the investment of the Fund. The assessment is collected through the Office of Attorney Registration and placed into a segregated fund within the state treasury.

The Board's budget is prepared and filed publicly in March each year, for approval by the Minnesota Supreme Court. The Board's FY'93 budget recently was approved by the Supreme Court. The Board currently budgets amounts to be paid in future for valid claims, most of which are not yet known, on the assumption that lawyer theft will continue on average as in the past. As noted, this past year, the number of valid claims, and more significantly, the amount of those claims, was down from recent

years. Despite the unpredictability of future dishonesty, budgetary projections have been reasonably accurate to date. With each additional year of claim experience, the Board hopes to remain accurate by averaging past payments.

Administrative Staff. The Office of Lawyers Professional Responsibility provides staff services to the Client Security Board. William Wernz, Director of the Office of Lawyers Professional Responsibility, has served as Director of the Client Security Board by court order since 1987. Mr. Wernz has announced his resignation, effective May 29, 1992, as Director of the Client Security Board and Office of Lawyers Professional Responsibility, and will return to private practice. His leadership and experience will be missed.

The Client Security Board, through liaison Justice Gardebring and Mr. Orenstein, is participating in the search to appoint a new Director for the two Boards. It is hoped that a new Director will be in place by the end of the summer.

Assistant Director Martin Cole and legal assistant Patricia Jorgensen handle the Board's day-to-day operation and investigations on approximately a quarter-time basis. Administrative expenses of approximately \$20,000 will be incurred by the Board this year. As projected, payment of claims accounts for almost 90 percent of the Board's expenses. The Board and its staff continue to keep non-claim expenses to a minimum.

The Minnesota Attorney General's office provides legal services to the Client Security Board in enforcing the Board's subrogation rights against respondent attorneys or against third parties from whom payment may be obtained. Martha J. Casserly, Special Assistant Attorney General, is the Board's attorney for all civil matters. The Board pays no attorney's fees for the

Attorney General's representation, but is responsible for direct costs of litigation. Litigation was recently commenced against one disbarred attorney on a subrogation claim for \$100,000.

Several attorneys are making regular, albeit small, payments to the Board on their total obligations. Recovery of amounts paid out by the Board, however, is never expected to be a significant independent source of revenue to the Board. This year it is expected that approximately \$16,000 will be recovered. Although Mark Sampson, following his arrest, promised to pay the Client Security Fund in full plus interest, the Board did not budget to receive any money from him in the near future.

Claims Procedures. Claims are initiated by submitting the claim on forms approved by the Board to the Director's Office. Claimants are provided forms and a brochure to help explain the process. The respondent attorney is given an opportunity to respond to the claim in writing. Although it is not uncommon for an already disbarred attorney to fail to respond, on the whole respondents have been cooperative. A member of the staff may meet personally with the claimant, unless the claim clearly can be decided solely on the information in the claim or from documents submitted by the claimant or obtained from the disciplinary proceeding.

Claimants are normally expected to pursue reasonably available civil remedies. In order to avoid hardship, the Board has exercised its discretion in some instances by waiving this requirement where the Attorney General will be pursuing litigation against an attorney under the Board's subrogation rights. In almost all cases, attorney disciplinary proceedings also will have been completed before Client Security payment is made. The Board will generally rely on findings made in a

related lawyer disciplinary action concerning misappropriation, or related civil or criminal matters where possible.

If a claim is denied, the claimant is notified in writing of the Board's determination and provided its reasoning. The claimant has the right to request reconsideration and a meeting with the full Board, so that the claimant will have full opportunity to present the merits of the claim before any denial is final. Because the Board desires that all claimants be provided a full opportunity to be heard and to present all documents and evidence in their favor before claims are finally resolved, the Board voluntarily spent considerable time meeting with claimants and a respondent attorney this past year on some particularly difficult claims.

Based upon its five-year experience of resolving claims, the Board has developed some guidelines for consistently applying its rules to particular types of claims (see Exhibit 1). If a claim fits into one of these categories, claimants are advised of the Board's general approach to their type of claim and offered the opportunity to present evidence to meet the Board's standards. At least one Board member or staff person also attend the ABA's annual client security forum to keep current on national trends and to ensure that the Board is analyzing claims consistent with other states' funds. Mr. Orenstein attended the ABA's annual forum on June 5-6, 1992.

Education and Information. As noted, a brochure explaining Board procedures is provided to claimants along with claim forms. Also as noted, one Board member recently attended the one-day ABA conference on client security to gain and exchange information. The Board has been collecting information on the insurance check notification rule adopted in New York,

which is claimed to have had some impact on attorney misappropriation of insurance settlements. The Board's staff, in connection with the Office of Lawyers Professional Responsibility, has commenced a study of misappropriation cases from the past several years, to see if any trends exist to indicate what forms of enforcement or deterrence are most effective. This study will continue this coming year. The Board has been cooperating with the MSBA's committee, particularly on the issue of exploring funding options for the future.

III. GOALS AND OBJECTIVES.

1. Claim Resolution.

In FY'93, the Board will continue to pay all valid claims in full up to the \$50,000 limitation. The Board has budgeted \$256,000 for claim payment next year. The current case load of the Board is manageable. There are only three claims that are more than nine months old, including two awaiting completion of civil litigation.

2. Rules Review and Theft Study.

The Board will be conducting a thorough review of the CSB Rules this year and expects to recommend some revisions to the Court. The Board will also conclude its study into the causes of lawyer theft. If any definitive trends are found, the information will be shared with the LPRB and with the MSBA study committee.

3. Disciplinary and Criminal Proceedings.

The Board will continue to urge strong enforcement measures against dishonest lawyers by the Office of Lawyers Professional Responsibility, the Court and by criminal authorities upon report of criminal actions by the victims. Several criminal convictions or guilty pleas have been followed by restitution orders as part

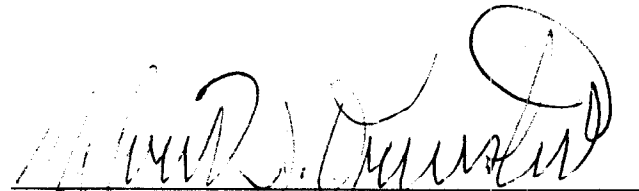
of the sentencing process. The Board has been spared several potential claims where respondent attorneys have made substantial restitution to their victims. The Board also will continue to aggressively pursue dishonest lawyers to obtain repayment of amounts paid out by the Fund.

4. Education and Publicity.


The Office of Lawyers Professional Responsibility routinely notifies prospective claimants of the existence of the Fund during disciplinary investigations and provides claim forms to potential claimants. The Board will continue to work with the MSBA's committee this year as it formulates its recommendations.

Respectfully submitted,

Dated: June 9, 1992


MELVIN I. ORENSTEIN
CHAIRMAN

Dated: May 27, 1992


WILLIAM J. WERNZ
DIRECTOR

Dated: May 27, 1992


MARTIN A. COLE
ASSISTANT DIRECTOR

Client Security: Hindsight and Foresight ...

"Somehow the money thing got out of whack." After five years of pondering why he stole over \$430,000, Mark Sampson offered this banality. As the saying *should go*, "Even hindsight is not always 20-20."

Sampson has been arrested and is being prosecuted. Is there any doubt that \$404,672 was well-spent to compensate Sampson's victims and to forestall bad publicity and possible legislative incursions? Reflections on Sampson make it a good time for a retrospective on the Minnesota Client Security Fund.

A retrospective is also timely because the Fund's board is nearing its fifth anniversary and has developed some common law for applying its basic claim payment criterion: Was "the loss caused by the intentional dishonesty of the lawyer" toward a client?

A prospective look at client security is also in order, for two reasons. An MSBA committee, chaired by Merritt Marquardt, is studying the Minnesota client security system, with a view to reporting by the end of 1992. Systems in several other states are experiencing great difficulties.

Illinois has stopped paying claims for lack of funds. The North Dakota fund has ceased to exist. After finding \$28 million in claims valid for 1991 alone, the New York fund cut the maximum it pays most claimants from \$100,000 to \$50,000. For similar reasons, Florida has imposed a temporary \$10,000 limit.

In comparison, the Minnesota fund is healthy. Minnesota has paid out claims of \$1.35 million through March 1992, but retains a fund balance of about \$800,000. There are only a couple of substantial pending claims which appear to have merit. The fund has actually made subrogation recoveries against several disbarred lawyers — though projected income does not take account of Sampson's reported promise, "I'm going to try to pay back \$450,000 plus interest."

Several recurrent issues have developed in the board's assessment of the validity of claims. Snapshots

of these issues show how challenging it has been to apply the basic rules governing claims fairly and consistently.

Lost interest. The rules exclude payment of claims of lost interest. What if an attorney steals \$10,000 of client funds, and then for five years falsely tells the client that the funds are held, earning ten percent simple interest? Should the fund pay the

"The media repeatedly inquired whether Sampson has not given the profession a black eye."

client \$10,000 that was stolen, or \$15,000? Assume that accounting documents are insufficient to identify the actual date of theft, and whether the interest was actually earned and received by the attorney or merely stated to the client. The board has declined to pay interest in such situations. A dissatisfied claimant has publicly and repeatedly expressed discontent over such decisions.

Investment claims. If a nonclient gives a lawyer money to invest, and the lawyer instead steals the funds, the loss will not be paid by the fund, because there is no attorney-client relationship. (Close fiduciary relationships, such as a guardian-ward relationship involving an attorney, are covered by the fund.) If, however, a client entrusts personal injury proceeds to a lawyer for investment, the claim may well be paid.

Unearned retainers. A lawyer who spends an unearned retainer, and is unable to repay, may or may not have acted dishonestly. If the lawyer apparently had no reasonable expectation or intention to perform

the services covered by the retainer, the claim ordinarily will be paid.

\$50,000 maximum. The board's rules contemplate recommending to the Supreme Court limits on the amounts payable per claim. Rather than make such a recommendation, the board has adopted as a general guideline a limit of \$50,000 per claim. (No limit on total reimbursement related to one lawyer's misconduct has yet been adopted.) However, the board may exceed this guideline in cases of particular hardship to claimants.

Collateral source. The board will not pay claims if there is a "reasonably available collateral source for reimbursement." How much civil litigation should a claimant have to undertake to determine whether the other source is available? An answer in the form of general principle is difficult to state, but the board has not required complainants to undertake fruitless litigation, such as obtaining judgments against Mark Sampson. The board instead, through subrogation, will obtain its own judgment.

Criminal justice system. Should the board report attorney thieves to prosecutors, in part with the hope of a restitution order being part of a sentence? Or would that be unfair to attorneys under investigation by the Lawyers Board, who must answer reasonable investigative inquiries? The balance between these competing considerations has been struck generally in favor of not reporting lawyer thefts to prosecutors, believing that such reports might unduly inhibit Lawyers Board investigations.

What lies ahead for the client security system? There will be attention to attorney theft prevention and detection programs. The overdraft notice program is modest in scope but is working well. Random trust account audit programs have been questioned on cost-benefit grounds but appear to be gaining ABA backing. In New York insurers are now required to notify insureds of checks over a certain

[REDACTED]

amount sent to their attorneys: The Director's Office is reviewing attorney thefts in 1990-91 to ascertain which preventative programs might be effective. Withal, it must be remembered that preventing and detecting theft are difficult at best; and that predicting thefts for budgeting purposes is impossible. The future in client security is never secured.

*"Every profession
has its miscreants
...the important
question is what
it does about them."*

Alternate or additional funding sources for client security are again being considered by the MSBA committee. Insurance and bonding have not been available but a new look is being taken at these sources. Questions have been posed about the availability of IOLTA funds, but those funds have been devoted to needy legal services projects.

The press accounts of Sampson's arrest and misdeeds have not congratulated lawyers for financing the Client Security Fund nor board members for their volunteer service. Instead, the media repeatedly inquired whether Sampson has not given the profession a black eye. The answer is that every profession has its miscreants; but in judging a profession, the important question is what it does about them. Perhaps congratulations are not in order over anything related to Mark Sampson, but there should be satisfaction in knowing that the Minnesota system paid nearly 100 percent of his victims' losses and that the Minnesota system is alive and in good health, while others are foundering. 2

CLAIMS AND AMOUNTS PER ATTORNEY
as of May 1, 1992

Attorney	Pending	Amount	Paid	Amount	Denied	Crim. Pros.
T.A.					1	
J.A.			2	\$100,000.00		No
L.B.			2	3,947.93		Yes*
T.B.					1	Yes
R.B.			1	50,000.00		Yes
J.B.			1	50,000.00		Yes
A.B.					1	Yes
C.C.					1	
M.C.					9	Yes
A.D.			3	62,875.00		Yes
J.D.					1	
B.D.	2	226,569.01	10	176,119.60		Deceased
J.D.					1	
B.E.					1	
R.E.					2	
J.F.			2	12,954.00	1	No
R.F.	5	5,697.00			2	No
S.F.	1	1,000.00				
J.F.			6	113,626.59	6	Yes
P.F.					1	
N.F.					1	
T.G.					1	
C.G.					1	
S.H.					1	
T.H.					2	
S.H.			2	12,800.00	3	No
H.H.					1	No

CLAIMS AND AMOUNTS PER ATTORNEY
as of May 1, 1992

Attorney	Pending	Amount	Paid	Amount	Denied	Crim. Pros.
D.H.			1	1,000.00		No
G.H.					6	
J.H.	1	3,500.00	4	18,900.00	1	Yes
C.I.			1	535.78		No
L.J.					1	
A.J.					1	
R.J. & J. S.					1	
A.C.	1	500.00				
W.L.	3	6,145.97	11	43,896.63	4	No
D.L.			1	40,000.00		Yes
E.L.			1	368.00		No
M.L.					1	
D.L.			3	560.00		No
P.M.					1	
G.M.			7	24,170.00	3	No
R.M.	4	20,641.40			1	
W.M.			3	425.00	6	No
N.L.F.	1	1,290.00				
L.O.	1	208,597.00				No
B.O.			3	15,297.72		Yes
K.O.	1	26,400.00				No
K.P.			2	39,000.00	1	No
W.P.	1	450,000.00				No
W.P.					1	
D.P.					2	No**
R.P.					1	
G.P.	1	21,361.70				No**

CLAIMS AND AMOUNTS PER ATTORNEY
as of May 1, 1992

Attorney	Pending	Amount	Paid	Amount	Denied	Crim. Pros.
T.P.			3	17,082.02	2	No
J.P.					1	
D.P.			1	16,450.00		No
M.R.			3	7,500.00	2	No**
M.S.			20	404,672.02	11	Yes
W.S.					1	
W.S.					1	
J.S.			2	57,821.34		Deceased
A.S.					1	
I.S.					1	
W.S.			5	50,391.66		Yes
P.S.			1	2,360.23		No
J.S.			5	2,349.26	1	No
J.S.			1	557.87		No
R.S.					1	
D.S.	1	14,692.74				
M.S.	1	15,637.79				No**
K.S.	1	500.00				
M.T.					1	
D.T.					1	
J.T.			2	6,160.00		No
N.T.					2	
S.W.			5	19,945.00	2	No
J.W.					1	
TOTAL	26	\$1,004,410.61	114	\$1,351,765.65	98	

* Criminal prosecution not for client theft.

** Authorities notified - did not prosecute or have not yet prosecuted.