

MINNESOTA CLIENT SECURITY BOARD

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January 11, 1995

Office of Appellate Courts
25 Constitution Avenue
Room 305
St. Paul, MN 55155-1500

OFFICE OF
APPELLATE COURTS

JAN 11 1995

FILED

Re: In Re Petition to Amend the Rules of the
Minnesota Client Security Board

Dear Clerk:

Enclosed please find the original and eight copies of the petition of the Minnesota Client Security Board to amend the rules of the Minnesota Client Security Board.

Very truly yours,

Office of Lawyers Professional
Responsibility

By Martin A. Cole

Martin A. Cole
Assistant Director

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Enclosures

cc: Honorable A. M. Keith
Honorable Paul H. Anderson
Nancy B. Vollertsen, Esq.

FILE NO. CO-85-2205

STATE OF MINNESOTA

IN SUPREME COURT

OFFICE OF
APPELLATE COURTS

JAN 11 1995

FILED

In Re Petition to Amend the
Rules of the Minnesota Client
Security Board

**PETITION OF THE
MINNESOTA CLIENT
SECURITY BOARD**

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA:

WHEREAS, the Rules of the Minnesota Client Security Board were adopted by the Minnesota Supreme Court effective July 1, 1987, and

WHEREAS, the Minnesota Client Security Board has apportioned part of its last six meetings to study and consider the Rules of the Minnesota Client Security Board, and

WHEREAS, the Board has studied the rules and proposed certain amendments to the rules, which the Board approved on November 7, 1994, and

WHEREAS, the Board believes that these proposed amendments would provide greater clarification and notice to members of the public and of the Minnesota bar concerning the requirements for payment by the Client Security Board, and therefore, are in the public interest,

NOW, THEREFORE, the Minnesota Client Security Board, pursuant to Rule 1.06(1), respectfully recommends that the Minnesota Supreme Court amend the Rules of the Minnesota Client Security Board as indicated in the attachment to this petition. The Board further recommends that the Court hold public hearings

concerning these proposed amendments. A statement in support of the proposed rule amendments will be filed by the Board.

Dated: January 10, 1995.

MINNESOTA CLIENT SECURITY BOARD
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By Nancy Brostrom Vollertsen
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INDEX OF PROPOSED RULE CHANGES

<u>Rule No.</u>	<u>Nature of Change</u>
Rule 1.01	Gender neutral language.
Rule 1.02	Change to create consistency with other Supreme Court boards.
Rule 1.04	Gender neutral language.
Rule 1.08	Typographical changes for internal consistency.
Rule 1.09	Substitution of NEW RULE .
Rule 2.01	Change to match Rule 3.02.
Rule 2.04	Deletion of excess language.
Rule 2.05	Deletion of excess language.
Rule 3.02(b)	Change to clarify necessary relationship and to reflect actual Board policy.
Rule 3.02(c)	SUBSTANTIVE LANGUAGE CHANGE.
Rule 3.02(i)	NEW SECTION.
Rule 3.02(j)	NEW SECTION.
Rule 3.04	Gender neutral language and clarification of language to match Board policy.
Rule 3.06	Clarification of language to match Board policy.
Rule 3.07	Clarification of language to match Board policy.
Rule 3.08	Gender neutral language and title.
Rule 3.09	Title.
Rule 3.11	Gender neutral language and clarification of language to match Board policy.
Rule 3.12	Gender neutral language and clarification of language to match Board policy.
Rule 3.13	Clarification of language to match Board policy.

Rule 3.14(d)	Correction of inadvertent error.
Rule 3.15	New language to match Board policy.
Rule 3.16	New language to match Board policy.
Rule 3.17	New language to match Board and Attorney General policy.
Rule 3.18	Deletion of language to match Board policy.
Rule 3.19	Rule deleted.
Rule 4.01	New language to match Board policy.

**RULES OF THE MINNESOTA CLIENT SECURITY BOARD
EFFECTIVE _____, 1995**

I. RULES GOVERNING THE CLIENT SECURITY BOARD

RULE 1.01 MEMBERSHIP OF THE BOARD

The Supreme Court shall appoint seven members to the Client Security Board. Five shall be lawyers actively practicing in the state, three of whom shall be nominees of the Minnesota State Bar Association, and two shall be public members. The Board shall elect a ~~chairperson~~ Chair from its members.

RULE 1.02 TERMS OF OFFICE

Two members of the Board shall be appointed for one year, two members for two years and three members for three years, and thereafter appointments shall be for three-year terms. The terms of public members shall be staggered. Any vacancy on the Board shall be filled by appointment of the Supreme Court for the unexpired term. No member may serve more than two consecutive three-year terms, in addition to any additional shorter term for which the person was originally appointed.

RULE 1.03 REIMBURSEMENT

Members shall serve without compensation, but shall be paid their regular and necessary expenses.

RULE 1.04 MEETINGS

The Board shall meet at least annually, and at other times as scheduled by the ~~chairperson~~ Chair. A quorum shall consist of four members.

RULE 1.05 IMMUNITY

The Board and its staff are absolutely immune from civil liability for all acts in the course of their official duties.

RULE 1.06 DUTIES OF THE BOARD

The Board is authorized:

- a. To administer and operate the Minnesota Client Security Fund, pursuant to statutes, court rules and internal procedures;
- b. To make final determinations on disbursement from the Fund;

- c. To recommend to the Supreme Court limits for the amount payable per claim against the Fund, and for total reimbursement for claims arising from one lawyer's misconduct;
- d. To undertake investigation of claims, coordinating with the Office of Lawyers Professional Responsibility;
- e. To recommend to the Supreme Court means available to cover extraordinary losses in excess of the assets of the Fund;
- f. To annually establish an administrative budget which may be paid from the Fund;
- g. To enforce subrogation and lien rights of the Fund;
- h. To sue in the name of the Fund for restitution of payments made pursuant to claims;
- i. To cooperate in educational activities for theft prevention and risk management, and for remedial services for problem lawyers;
- j. To certify the financial condition of the Fund;
- k. To employ and compensate consultants, legal counsel and employees;
- l. To adopt internal rules of procedure not inconsistent with these rules, and make recommendations to the Supreme Court on rule changes.

RULE 1.07 CONFLICT OF INTEREST

- a. A member of the Board who has or had a lawyer-client relationship or financial relationship with a claimant or the lawyer subject to the claim shall not participate in the investigation or adjudication of the matter.
- b. A member of the Board who is a member or of counsel in the same law firm or company as the lawyer subject to the claim shall not participate in the matter.

RULE 1.08 DUTIES OF THE DIRECTOR

The Board may recommend to the Supreme Court a dDirector, who shall serve at the pleasure of the eCourt, to perform duties assigned to the Board, including but not limited to:

- a. Screening claims, coordinating investigations with the Lawyers' Professional Responsibility Board, and presenting claims at Board hearings;

- b. Coordinating enforcement of liens, restitution and subrogation rights of the Fund;
- c. Maintaining records of the Board, suitable for audit of the Fund;
- d. Keeping current on legal and procedural developments of the client security funds in other states;
- e. Performing other duties as assigned by the Board.

RULE 1.09 CONFIDENTIALITY

~~The files, records and proceedings of the Board and Director, as they may relate to or arise out of any claim are confidential and shall not be disclosed except as provided in these rules or the Rules of Lawyers Professional Responsibility.~~

Claims, proceedings and reports involving claims for reimbursement are confidential until the Board authorizes reimbursement to the claimant, except as provided below.

a. After payment of the reimbursement, the Board shall publicize the nature of the claim, the amount of reimbursement and the name of the lawyer. The name and the address of the claimant shall not be publicized by the Board unless specific permission has been granted by the claimant.

b. This Rule shall not be construed to deny access to relevant information by professional disciplinary agencies or other law enforcement authorities as the Board shall authorize, or the release of statistical information which does not disclose the identity of the lawyer or the parties.

RULE 1.10 ANNUAL REPORT

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.

III. RULES GOVERNING THE FUND

RULE 2.01 ESTABLISHMENT OF THE FUND

There is created a Minnesota Client Security Fund to aid those persons directly injured by the dishonest act conduct of any lawyer during an attorney-client or fiduciary relationship.

RULE 2.02 FINANCING

The Fund shall be financed from:

- a. Lawyer restitution and subrogation for claims paid;
- b. Gifts and contributions;
- c. Upon order of the Supreme Court, assessments of licensed lawyers.

RULE 2.03 ORDERING, REINSTATEMENT AND CANCELLATION OF ASSESSMENTS

The Supreme Court may order, reinstate or cancel the collection of assessments after review of the financial condition of the Fund certified by the Client Security Board in its annual report.

RULE 2.04 FAILURE TO PAY ASSESSMENT

Upon failure to pay the assessment when due, the lawyer's right to practice law in the state shall be automatically suspended, ~~and the lawyer may not hold himself out as qualified to practice while in default.~~

RULE 2.05 DISBURSEMENTS FROM THE FUND

- a. Upon written authorization of the Board, claims may be paid from the Fund.
- b. The Board shall annually prepare an administrative budget to be approved by the Supreme Court, from which the Board may pay necessary expenses.
- c. ~~The Funds which are not required for the administrative budget or to pay claims~~ shall be invested as provided by law.

III. RULES GOVERNING THE CLAIM PROCESS

RULE 3.01 CLAIMS PAYMENT DISCRETIONARY

Reimbursements of losses by the Board are discretionary, and not a matter of right. No person shall have a right in the Fund as a third party beneficiary or otherwise either before or after allowance of a claim.

RULE 3.02 FILING CLAIMS

The Board shall consider a claim filed on forms provided by the Board if:

- a. The claimant experienced a loss of money or property, excluding loss of profit, consequential damages, interest, and costs of recovery; and

b. The loss of the ~~client~~ claimant arose out of and during the course of a lawyer-client relationship of a matter in this state, or a fiduciary relationship between the lawyer and the claimant which arose out of a lawyer-client relationship in this state; and

c. The loss was caused by the ~~intentional~~ dishonesty conduct of the lawyer and the claim was not based on negligence; and

d. There is no reasonably available collateral source for reimbursement to the claimant, such as insurance, surety, bond, or some other fund; and

e. Reasonable efforts have been made by the claimant to exhaust administrative and civil remedies; and

f. The lawyer was licensed to practice law in this state at the time of the misconduct or was licensed within three years prior to the misconduct; and

g. Less than three years have elapsed between the filing of the claim and the date the claimant knew or should have known of the dishonest conduct; and

h. The dishonest conduct occurred on or after January 1, 1964.

i. As used in these Rules, "dishonest conduct" means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value, including but not limited to:

(1) Refusal or failure to refund an advance fee when the lawyer performed no work whatever, or an insignificant portion of the services that he or she agreed to perform. All other instances of a lawyer failing to return an unearned fee or the disputed portion of a fee are outside the scope of the Fund.

(2) Obtaining money or property from a client representing that it was to be used for investment purposes when no such investment was made. The failure of an investment to perform as represented to, or anticipated by, the applicant is outside the scope of the Fund.

j. For purposes of these Rules, including but not limited to those acts set out in Rule 3.02(i), all payments made by the lawyer to the client following the dishonest conduct, however denominated by the lawyer, shall be treated as restitution of principal.

RULE 3.03 PRIVILEGED COMPLAINTS

A claim filed pursuant to these Rules is absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the claimant.

RULE 3.04 SCREENING CLAIMS

The Chairperson shall designate a Board member or the Director to screen a claim and to advise the lawyer named in the claim that ~~he~~ the lawyer has 20 days to respond to the Board in writing. The lawyer shall receive a copy of the claim, ~~and be notified at the address on the records of the Supreme Court for his license.~~ by first class mail sent to the lawyer's last known address.

RULE 3.05 CLAIM INVESTIGATION

If a claim is sufficient, the Director shall promptly request the Office of Lawyers Professional Responsibility to furnish a report on any investigation matter.

RULE 3.06 RIGHTS OF LAWYER SUBJECT TO CLAIM

A lawyer subject to a claim shall be entitled to receive a copy of the claim, to respond to the claim in writing to the Board, and to request a an evidentiary hearing as provided by ~~these~~ Rules 3.12.

RULE 3.07 LAWYER COOPERATION

It shall be the duty of a lawyer subject to a claim to cooperate and comply with the reasonable requests of the Board and the Board's investigator by furnishing papers, documents or objects, providing a full written explanation, and appearing at conferences and hearings. The lawyer's failure to respond or cooperate may be reported to the Office of Lawyers Professional Responsibility for possible discipline under this rule. ~~is grounds for discipline.~~

RULE 3.08 ~~INVESTIGATORY~~ SUBPOENA

With the approval of the Board Chairperson, the Director may subpoena and take testimony of any person believed to possess information concerning a claim.

RULE 3.09 JURISDICTION ~~INVESTIGATIVE~~ CHALLENGE

The district court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the investigation of a claim.

RULE 3.10 ACTION AFTER INVESTIGATION

No later than 120 days from the date of the notification to the Office of Lawyers Professional Responsibility, whether or not the Director has received a

report from the Lawyer's Professional Responsibility Board, the Chairperson shall determine whether additional investigation should be conducted, a hearing should be held, or a determination may be immediately rendered.

RULE 3.11 PANELS

The Chairperson may divide the Board into panels, each consisting of not less than three Board members and at least one of whom is a nonlawyer, and shall designate a ~~chairperson~~ Chair for each panel. A panel may be assigned to hear consider a matter and make a recommendation to the entire Board, or may conduct a hearing under Rule 3.12 in lieu of a hearing before the entire ~~b~~Board.

RULE 3.12 REQUEST FOR HEARING

If the claimant or the lawyer subject to the claim requests a an evidentiary hearing, the Chairperson may order such a hearing, defer the matter for further investigation or until any proceedings of the Lawyers Professional Responsibility Board have been completed, or deny the request.

RULE 3.13 HEARING

If a an evidentiary hearing under Rule 3.12 is ordered, both the claimant and the lawyer and their representatives may appear. The hearing shall be recorded and preserved for five years.

RULE 3.14 DETERMINATION

- a. Payment of a claim from the Fund shall be made only on affirmative vote of four members.
- b. In determining the amount of any payment, the Board may consider:
 - (1) Monies available and likely to become available to the Fund for payment of claims;
 - (2) Size and number of claims presented and likely to be presented in the future;
 - (3) The amount of a claimant's loss compared with losses sustained by others;
 - (4) The comparative hardship suffered by a claimant because of a loss;
 - (5) The total amount of losses caused by the dishonest conduct of any one lawyer;

(6) The culpability or negligence of the claimant contributing to the loss;

(7) The extent to which there is a collateral source for reimbursement to the claimant;

(8) The effort made by the claimant to exhaust administrative and civil remedies;

(9) Other factors as appear to be just and proper.

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.

d. The Board may, in its discretion, award interest on any award at the rate of interest payable under Minnesota § 549.04-2 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.

RULE 3.15 DENIAL

If the Board determines that the criteria of Rule 3.02 have not been met, the Board may deny the claim. The Board may authorize payment of that portion of a claim proved, although the entire amount of a claim is undetermined. The Board may defer payment of a claim in order to await completion of investigations of related claims, or for payment in subsequent fiscal years. The claimant and the lawyer shall be notified in writing of the Board's determination.

RULE 3.16 RECONSIDERATION

If a claim has been reduced or denied by the Board, a claimant ~~or the lawyer~~ subject to the claim may request reconsideration of the determination within 30 days by submitting a written request to the Board. A claimant may not seek reconsideration if the full claim is allowed but a lesser amount has been authorized for payment under Rule 3.14(b) or (c), or on the basis that the Board did not award interest under Rule 3.14(d).

RULE 3.17 SUBROGATION

A claim paid pursuant to these Rules shall be repaid to the Fund by the lawyer. ~~If the lawyer is unable to pay or cannot be found, the~~ Board shall obtain a subrogation agreement from the claimant ~~for the right to restitution.~~ The Board may bring an action against the lawyer, the lawyer's assets, ~~or the lawyer's estate,~~ the lawyer's law firm or partner(s) or any other person(s) or entities against which subrogation rights may be enforced, or may file liens against the property of the lawyer in the name of the Fund, in an amount equal to the sum paid the claimant plus the Board's attorney fees and costs. The claimant shall be notified of any action and may join in the action to press a claim for the loss in excess of the amount paid by the Fund, but the Fund shall have first priority to any recovery in the suit.

RULE 3.18 NOTIFICATION OF CLAIM PAID

- a. The Board shall advise the Office of Lawyers Professional Responsibility ~~and the National Conference of Bar Examiners~~ of any claim paid, the amount paid, and the name of the lawyer.
- b. Upon request of the lawyer, the Board may advise a lawyer admission or discipline authority of another jurisdiction the status of any file on the lawyer.

~~RULE 3.19 INFORMATION RELEASED~~

~~Information on the number of claims presented to the Board, the number and amount of claims paid, the restitution collected, the suits filed, and the amount in the Fund shall be public information. The Board may disclose the fact that a claim is or is not being investigated or considered by the Board, and the Board's disposition of a claim.~~

IV. RULE GOVERNING EDUCATION

RULE 4.01 EDUCATION

The Board ~~or the Director~~ shall conduct research, analyze statistics, and categorize claims to determine ~~those educational~~ whether there are methods and programs that would minimize lawyer misconduct resulting in claims against the Fund. The Board shall make recommendations to the Court of any such programs.

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition to Amend the
Rules of the Minnesota Client
Security Board

**STATEMENT IN SUPPORT OF
PETITION OF THE MINNESOTA
CLIENT SECURITY BOARD**

INTRODUCTION

The Minnesota Client Security Board was created by this Court in April 1986. As its first task, the Board was ordered to prepare internal rules and rules of procedure and to petition the Supreme Court for their adoption. The Court appointed Marcia Proctor, former Director of the Board of Law Examiners, to assist the new Board in drafting rules. The rules were submitted to the Court and on April 10, 1987, the Rules of the Minnesota Client Security Board were adopted effective July 1, 1987.

The Board's rules were drafted without the benefit of actual operating experience or claim resolution experience. It was envisioned that some amendments may prove necessary once the rules began being applied. In 1992, based upon five years of actual experience, the Board began the process of reviewing the rules for possible amendment. The Board's primary function, however, remains prompt claim resolution, and as a result, the project soon was tabled, until recently. In addition, the Minnesota State Bar Association established a study committee to review the Board's funding mechanism. Former Board Chair Melvin Orenstein was a member of this committee and the Board provided considerable information and assistance to that committee. As a result, however, much of the Board's limited time for non-claim activities again was diverted.

As was set out in the Board's June 1994 annual report, the Board returned to the project of reviewing its own rules within the last year. At each of the Board's

last six meetings, through November 1994, the Board reviewed selected portions of the rules for possible amendment. This petition and the attached proposed rule changes are the result of that thorough review process.

Some of the changes are merely administrative "housekeeping" changes which do not warrant substantial written comment. For example, there are changes to make the language of the rules gender neutral and internally consistent as to use of terms or capitalization. Such changes will not be commented upon further.

Other proposals involve either some substantive change or are being proposed to reflect the Board's actual operating experience. For the sake of clarity and ease of review, these proposals will be briefly discussed below in numerical order, which may not necessarily be the order of their impact or significance.

The Board recommends that the Court seek public comment and hold public hearings concerning these proposed amendments to the Rules of the Minnesota Client Security Board. The scrutiny and comments of the bar and the public will be welcome and will ensure that the Court has a full record and basis on which to, hopefully, adopt the recommended changes.

PROPOSED RULE CHANGES

Rule 1.09 - Confidentiality

The Board proposes eliminating current Rules 1.09 and 3.19 (information released) and substituting an entirely new comprehensive rule concerning the Board's confidentiality and publicity obligations. The Board recommends that the Court substitute ABA Model Rule 17 (confidentiality) for the Board's former rules. Having two separate rules has created some overlap and confusion, which one comprehensive rule will eliminate.

The Board perceives a need to publicize its activities and awards to a degree which the current rules appear to prohibit. As the Comment to ABA Model Rule 17 notes, "Publication of awards by the Board demonstrates the legal profession's

responsiveness to clients and commitment to self-regulation. . . . The public, bar, and judicial leaders, and the news media should be kept informed of the activities of the Board and the status of its reimbursement efforts." If the new rule is adopted, the Board intends to regularly publicize its activities and awards. As the proposed rule states, information concerning the claimant still would not be publicized unless the claimant has specifically authorized such disclosures. This appears to adequately balance the privacy concerns of recipients of large awards from the Board.

Rule 2.01- Establishment of the Fund

This change will match the language of Rule 2.01 to that of Rule 3.02, which sets out the basic requirements for claim payment.

Rule 2.04- Failure to Pay Assessment

This amendment merely eliminates unnecessary language. Attorneys are automatically suspended for failure to pay the attorney registration fee (which includes the Client Security Fund assessment) and no further language is necessary.

Rule 2.05(c) - Disbursements from the Fund

This change will more accurately reflect how the fund is handled. All amounts collected through the attorney registration fee are placed into the state general treasury for investment as provided by law. No portion of the fund is separated for the administrative budget or to pay claims. Nor is there any "reserve" fund maintained separate and apart from the rest of the fund for investment.

Rule 3.02(b) - Filing Claims

Two changes are proposed to clarify this particular section. The term "client" will be changed to "claimant," since a claimant to the Client Security Board does not have to be a client of the lawyer. In addition, a new phrase will be added to clarify that not all fiduciary relationships which may possibly exist between a lawyer and a claimant are covered under the Board's rules. Only fiduciary relationships which arise out of a lawyer-client relationship (although not necessarily a lawyer-client

relationship with the claimant) are covered. For example, a lawyer has fiduciary obligations to her firm or outside business partners, but losses caused by the attorney's dishonest conduct in such relationships likely will not be payable by the Board.

Rule 3.02(c)

Payment by the Board currently requires a finding of intentional dishonesty by the lawyer. On certain types of claims, however, such as unearned retainer claims, the use of the word "intentional" has created analytical difficulties for the Board. For example, claims against a disabled lawyer who, perhaps without specific intent, misappropriates substantial amounts of money from his or her law office trust account may appear not to be payable under the Board's current rule. Although the Board has paid some such claims under the current standard, a change to the more universal standard of dishonest conduct would give the Board more ability to pay clearly deserving claims. The ABA Model Rules and virtually all other states' client protection/security funds employ a "dishonest conduct" standard. The Board is not aware of any other client security fund which operates under an "intentional dishonesty" standard.

Rule 3.02(i)

This new section would further define the "dishonest conduct" standard established in Rule 3.02(c) above. This section is not intended as an exhaustive list of conduct which will qualify for payment, nor is it intended to limit the Board's discretion to pay valid claims under fact patterns not specifically identified here. The purpose of this section is to provide notice to claimants and attorneys about certain types of conduct covered or not covered by the Rules and thus help potential claimants identify whether they have a claim. The specific language employed was modeled after language contained in Rule 6 of the California Client Security Fund rules.

Rule 3.02(j)

This new section will notify claimants how the Board determines the amount of the payable loss in certain claims. For example, this section reflects how the Board determines the amount of the loss in situations where a lawyer claims to invest a client's funds, but instead misappropriates those funds, and then makes small payments to the client as "interest" in order to prevent the client from learning the truth of their loss. The Board has always treated such payments not as interest payments (which would not diminish the principal) but, instead, as return of principal, or restitution. This policy is consistent with that of virtually all client security funds.

Rule 3.04 - Screening Claims

This change will merely codify the actual practice of the Board as to how it notifies respondents of claims and requests their cooperation. The change further will make clear that the Board only need make a reasonable attempt to notify the respondent, and not ensure actual notice. Frequently, respondents who have been suspended or disbarred are not readily locatable. Thus, use of their last known address is reasonable.

Rule 3.06 - Rights of Lawyer Subject to Claim

This change is part of a series of minor changes to rules dealing with when the Board should conduct a formal hearing on a claim (*see also* proposed changes to Rules 3.11, 3.12 and 3.13 below). This change will be discussed more fully below.

Rule 3.07 - Lawyer Cooperation

This proposed change will reflect the fact that the Board may report a lawyer's non-cooperation to the Office of Lawyers Professional Responsibility for possible discipline, but that the Client Security Board has no authority itself to impose discipline. Because most respondents already have been suspended or disbarred, the Board infrequently would report failure to cooperate to the Lawyers Board.

Rules 3.11, 3.12 and 3.13 - Panels, Request for Hearing and Hearing

These three rule changes (along with the change to Rule 3.06) will clarify the Board's limited use of formal hearings to resolve contested claims. The Board to date has never conducted a formal contested evidentiary hearing. While the rules provide the authority to do so in some situations, the Board routinely defers to contested findings from other forums, including civil litigation and lawyer disciplinary proceedings.

The Board frequently meets with claimants and/or respondents as part of the investigation of a particular claim or when reconsidering the denial of a claim. Such meetings, however, are not formal evidentiary hearings subject to the requirements of counsel and a court reporter. There has been some confusion on this point when the Board has invited claimants or respondents to appear and meet with them. The rules are set up to cover only the rare situation in which a contested evidentiary hearing would need to be held before the Board. The Board believes these minor language changes will eliminate unnecessary confusion.

Rule 3.14(d) - Determination

When the Court recently amended the rules by adding this section, based upon the MSBA's proposal to allow the Board to award interest in its discretion, it appears that a typographical error was made concerning the applicable statute section used for determining the current judgment interest rate.

Rule 3.15 - Denial

The current rules do not specifically require that the Board notify the claimant or (attempt to notify) the respondent of the Board's determination of a claim. In fact, the Board's practice is to do so, of course. The proposed change will merely codify this practice.

Rule 3.16 - Reconsideration

The proposed changes again reflect actual Board policy. The current rule allows either a claimant or the respondent attorney to request reconsideration of a denied or reduced claim. In fact, as the Board has recognized, respondent attorneys need not be offered the opportunity to seek reconsideration of any Board determination; only the claimant should. Thus, the change is recommended to reflect that fact.

The reason a respondent attorney need not be provided an opportunity to request reconsideration of claims by the Board is that all client security payments are discretionary. When the Board seeks to enforce its subrogation rights against the respondent attorney, and if the claimant had not already obtained a judgment against the respondent attorney, the respondent still will have any rights and defenses he or she may have to oppose the Board's claim and defend a civil suit. Thus, there is no specific reason for the respondent to be allowed to request that the Board reconsider payment of an award. Further, the rules never authorized the respondent to challenge paid claims, yet seemed to create an exception for a partially paid claim. This should be corrected.

In certain situations, the claimant should not be able to request reconsideration either. This has always been recognized by the rule but the Board seeks to clarify the list of those situations, and add the denial of an award of interest under new Rule 3.14(d) to that list.

Rule 3.17 - Subrogation

The Attorney General's Office provides representation for the Client Security Board in seeking enforcement of its subrogation rights against respondent attorneys and others. In some particular situations, the Board has sought to enforce subrogation rights against third persons who may have some obligation to pay on behalf of the respondent attorney, such as partners or a bank. The current rule,

although likely broad enough to cover such situations, has been the subject of some uncertainty. Although they have done so successfully, the Attorney General's Office has had to argue that the current rule authorizes suit against third persons. The proposed changes to the language likely will simplify future matters.

Rule 3.18 - Notification of Claim Paid

This change simply eliminates the stated obligation of notifying the National Conference of Bar Examiners on paid claims. In fact, the Board does not do so nor is such information sought by the NCBE.

Rule 3.19 - Information Released

This rule will be deleted. See discussion of new Rule 1.09 above.

Rule 4.01 - Education

The Board wishes to match the language of the rules to what in fact has been the Board's evolved practice. Both the Board and the Director's Office participate in this process.

MINNESOTA CLIENT SECURITY BOARD
25 Constitution Avenue, Suite 105
St. Paul, MN 55155-1500
(612) 296-3952

Dated: Jan 4, 1995.

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and

Dated: January 10, 1995.

By Marcia A. Johnson
MARCIA A. JOHNSON, DIRECTOR
Attorney No. 182333