

## CLIENT SECURITY BOARD

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Client Security Board Approves Claims.” So reads the standard headline to the press release issued by the Minnesota Client Security Board (CSB) following one of its quarterly meetings. This flat, nondescriptive statement hardly does justice to the workings of the board, the volunteers who serve on it, or the staff hours that this office provides to investigate and analyze claims that are made to the board for payment.Ftn 1

The Minnesota Client Security Fund and the CSB are now in their 25th year. Sometime in the coming year, the board will approve for the 500th time a claim submitted by a victim of lawyer dishonesty. Both are milestones worth noting. According to the board’s recently filed annual report,Ftn 2 in its 24 years to date, 490 claims have been approved in the total amount of approximately \$6.35 million. Whenever someone laments the current state of the legal profession, these numbers are worth trotting out in rebuttal.

The cynic will no doubt state that the mere need for a client security fund (or as more universally called, a client protection fund or lawyers’ fund for client protection) shows that the legal profession suffers from too many dishonest souls. While even one such lawyer indeed is too many, the fact that a small handful (among the 28,000 or so practicing lawyers in Minnesota) engage in financial dishonesty should not shock the conscience—especially as economic times get tougher.

What is important is the response to such dishonesty that the bar provides: a dedicated fund of approximately \$3.3 million available to repay the victims of proven dishonesty at no cost to the claimant. Stop for even a brief time to reflect on that statement, and you’ll realize how remarkable such an endeavor is—there exists no legal obligation to repay the victims of some other lawyer’s dishonesty. It is considered, however, the moral and ethical obligation of all lawyers to make those victims as whole as possible. And at \$12 per lawyer per year,Ftn 3 the fund is an exceptional bargain to accomplish that goal.

## Recent History

In its most recent fiscal year, as reported in the annual report, the CSB approved payment of 22 claims in the total amount of \$57,555. This represents one of the lowest annual payouts in the history of the board. As many as 42 claims have been paid in one year, and on two occasions the amount paid in a year exceeded \$700,000. The low payout this year does not reflect any new-found stinginess on the part of the board, however. With a maximum payment per claim of \$150,000, the board is able to pay almost all valid claims in full. So does the lower payout instead reflect that lawyer dishonesty is on the wane? Well, maybe, but probably not.

Intuitively, it seems that lawyer theft will increase in hard economic times, not decrease. One pending discipline case reflects the classic situation of a lawyer who is facing disbarment or suspension for using the law firm's trust account as an operating account (or perhaps a ready reserve account might be a more accurate comparison) to meet payroll and other expenses, since the firm's revenues had declined and it thus had cash flow problems. The lawyer tried to cover the shortages with periodic repayments when settlements were obtained, but inevitably an overdraft occurred and the lawyer's conduct was detected.

In fact, such examples have been surprisingly few during the recent economic slump. Of course, it is not uncommon for misappropriation to go undetected for some time, while the lawyer puts off a client with stalling maneuvers or lies, so more losses connected to the current economy likely will begin to surface in the near future. And fortunately not all misappropriation matters result in claims to the CSB; the example above involved an established firm with full capability and incentive to make good the shortage in its trust account (and thus owed to its clients). Many of Minnesota's most notorious lawyer-thieves fall into this category.

Claims to the CSB more likely involve either criminal theft such as forged settlement checks or conversion of funds supposed to be held in trust for a specific purpose, or claims involving the failure to refund an unearned fee. The former group is often comparatively easy for the board to resolve since it can rely on findings from other forums such as criminal prosecutions or disciplinary proceedings; the latter type of claim is not always so easy. Although the board's rules preclude it from resolving true fee disputes ("I don't think the lawyer's services were worth what she charged me"), once it is determined that an advance fee payment, which should be held in trust until earned,Ftn 4 in fact was not earned because the lawyer did no work or an insignificant amount of the work agreed to, and then was not refunded upon termination of representation or upon request,Ftn 5 the board's rules define it as dishonest conduct and allow payment of the unearned fee.Ftn 6

Such claims frequently involve fairly nuanced determinations of what services were agreed to and what services were performed; since many of the attorneys against whom claims are made are suspended or disbarred, often the board must resolve the claim without input from the respondent lawyer or access to their file. Although it is not a requirement that the lawyer be suspended or disbarred before a claim is approved by the CSB, in fact it is extremely rare that a claim is approved against an attorney who remains licensed. The board's rules predicate payment on a finding of dishonest conduct, which usually will warrant substantial lawyer discipline. A lawyer facing discipline who wishes to avoid suspension has a strong incentive to make restitution voluntarily, thus sparing the fund in such instances.

These types of unearned-and-retained fee claims seem the most likely to increase during tough economic times as lawyers may be tempted to "prepay" themselves for work they expect to perform, but then for some reason do not complete. If such conduct reaches a point where either an overdraft occurs on the lawyer's trust account or clients seeking refunds start to file complaints, the lawyer may find himself facing discipline and client security claims.

### **Board and Fund Health**

As the above description may indicate, this is a hard-working board that is required to make some difficult determinations. The five lawyers and two public members meet quarterly and usually resolve 8-12 claims. The supreme court appoints all members of the CSB, with the MSBA nominating three of the five lawyer positions. One trend is that three of the most recent appointees, one lawyer and both nonlawyers, previously served on the Lawyers Professional Responsibility Board. Using their LPRB experience on the Client Security Board is a logical progression for individuals desiring to continue their service to the legal profession. Financially, the fund remains healthy and able to pay claims promptly should a major defalcation be uncovered. In short, the public remains protected and well-served by the Minnesota Client Security Board.

### **Notes**

1 Senior Assistant Director Julie Bennett and paralegal Tricia Jorgensen handle investigations for the Client Security Board in the Director's Office. The Minnesota Attorney General provides legal representation for enforcement of the board's subrogation rights on all paid claims.

2 The Client Security Board annual report may be found at <http://csb.mncourts.gov/reports/Documents/2011%20CSB%20Annual%20Report.pdf>.

3 This is the share of the annual lawyer registration fee that goes to the Client Security Fund. At one time, the amount was \$20/year, but the board has authorized steady

reductions in the amount collected, and twice in recent years authorized a one-year suspension of their share of the fee altogether.

4 *See* Rules 1.5(b) and 1.15(c), Minnesota Rules of Professional Conduct (MRPC).

5 *See* Rule 1.16(d), MRPC.

6 Rule 3.02(i)(1), Rules of the Minnesota Client Security Board (RMCSB).