

THE NCPO *e*-FORUM

A COLLECTION OF INTERNET TOPICS

NOV2001-JUN 2003

This collection represents inquiries and responses to a wide variety of Client Protection Issues which were posted on the NCPO *e*-Forum. The queries and responses are unedited and appear just as they were written by NCPO members. NCPO hopes that you find this resource helpful and we intend to continue to offer similar publications of interest to the Client Protection Community.

For further information or questions, please feel free to e-mail webmaster@ncpo.org.

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ADVANCE LEGAL FEES

-----Original Message-----

From: NCPO [mailto:ncpo@mybizz.net]
Sent: Monday, May 19, 2003 10:25 AM
Subject: advance legal fees

Dear NCPO Members:

I know that in many of your jurisdictions, advance legal fees are required to be treated as client property when paid, segregated in escrow and drawn upon only as earned. In these jurisdictions, how is a fee dispute handled? Is the disputed fee required to be maintained in escrow until the dispute is resolved? What avenues, if any, are there for resolving any fee disputes?

Thank you for your assistance.

Tim O'Sullivan
NY Fund

-----Original Message-----

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Monday, May 19, 2003 11:12 AM
Subject: RE: advance legal fees

Tim,

Mass. Rules of Professional Conduct Rule 1.15 (2) states in pertinent part:
" Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein [trust accounts], but the portion belonging to the lawyer or law firm must be withdrawn at the earliest reasonable time after the lawyer's or law firm's interest in that portion becomes fixed. If the right of the lawyer or law firm to receive such portion is disputed by the client, the disputed portion shall not be withdrawn until the dispute is resolved." In Mass. we have voluntary fee arbitration. A client may request fee arbitration, and where the lawyer participates, the system works fairly well. But, when the lawyer does not participate, the system does not work. As you can imagine, some of the CSB claims are fee disputes. They are always tricky for the Board, because the Board does not exercise jurisdiction over claims of fee disputes. But it does make awards in unearned fee cases and these often are very close to being fee disputes.

Karen

----- Original Message -----

From: "Bob Welden" <bobw@wsba.org>
Sent: Monday, May 19, 2003 12:17 PM
Subject: Re: advance legal fees

Washington's rule is similar (it is RPC 1.14 -- we did not adopt MRPC 1.10):

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

The inadequacy of voluntary fee arbitration as a client protection tool will be one of the matters discussed at the National Client Protection Forum in Chicago.

Bob Welden
General Counsel
Washington State Bar Association

----- Original Message -----
From: "Towery, James E." <JET@hogefenton.com>
Sent: Monday, May 19, 2003 12:39 PM
Subject: Re: advance legal fees--Mandatory fee arbitration

For twenty years, we have been hearing comments like that from Massachusetts--voluntary fee arbitration programs are inadequate to really provide a service to the public and to protect client interests. When lawyers have the option of refusing to participate in fee arbitration, the inevitable results are client frustration and a lack of a meaningful remedy for clients with fee disputes. Those jurisdictions, like California, New Jersey and the District of Columbia, that have mandatory fee arbitration programs, have found fairly universally that both clients and attorneys are satisfied with the programs. They serve the public well. They provide a meaningful remedy for clients.

It is my sincere wish that client protection fund personnel in those jurisdictions with voluntary fee arb programs should be strong advocates for the establishment of mandatory programs. The McKay report recommends effective fee arbitration programs as an integral part of the total system of client protection. Voluntary programs are simply not effective.

Jim Towery

----- Original Message -----
From: Marbley Green Janet
Sent: Monday, May 19, 2003 12:47 PM
Subject: RE: advance legal fees

Ohio's rule is identical to the Massachusetts Rule. The disputed fee may not be withdrawn until the dispute is resolved. Ohio also has voluntary fee arbitration for resolving fee disputes. The CSF does not reimburse claims constituting fee disputes, but distinguishing between an unearned fee and a fee dispute is one of my Board's biggest challenges.

Janet Green Marbley

-----Original Message-----
From: Chris Sutton [mailto:chris@wsba.org]
Sent: Monday, May 19, 2003 12:02 PM
Subject: RE: advance legal fees

Washington State's RPC 1.14 requires that, when a dispute arises as whether a lawyer is entitled to client funds held in a trust account, the funds remain in the trust account until the dispute is settled. WSBA offers both a fee arbitration program and a mediation program to help settled the disputes, although neither is mandatory.

Christopher Sutton
Professional Responsibility Counsel
Washington State Bar Association

-----Original Message-----
From: Sperber, Jill
Sent: Monday, May 19, 2003 12:16 PM
Subject: RE: advance legal fees

California has mandatory fee arbitration. Advanced legal fees do not have to be placed in a client trust account unless and until the fees are disputed. The client security fund does not pay out money to clients for unpaid fee dispute awards. California is one of maybe two states (just D.C. that I know of) that enforces unpaid awards against the attorney-we can pull their ticket until the award is paid!

APPELLATE REVIEW

----- Original Message -----

From: <Tonimoss@aol.com>

Sent: Thursday, September 26, 2002 5:22 AM

Subject: list serve

I am looking to hear from any funds that have appellate review of the decisions of the Trustees. I also would like to know what is the procedure for the review? Thanks. janet moss - maryland client protection fund

-----Original Message-----

From: Chris Janku [SMTP:cjanku@mobar.org]

Sent: Thursday, September 26, 2002 9:07 AM

Subject: RE: FW: list serve

In Missouri the final decision is by the Board of Governors of of the Missouri Bar but there is not any review process before the Board or any other entity.

-----Original Message-----

From: Karen O'Toole [SMTP:k.otoole@massbbo.org]

Sent: Thursday, September 26, 2002 9:38 AM

Subject: RE: list serve

In Massachusetts there is no appeal from the Board's decision. There has been one appeal taken to the State Supreme Court (the Court that established the Clients' Security Board and maintains supervisory responsibility over) and the Court, after a hearing before a single justice, dismissed the appeal. The issue of the right of parties to appeal a decision of the Board was never addressed by the Court; rather the Court found that since the former attorney had refused to communicate with counsel for the Board and attend the Board's hearing, he should not now be allowed to complain about the matter.

----- Original Message -----

From: Kenneth.Bossong@judiciary.state.nj.us

Sent: Thursday, September 26, 2002 8:34 AM

Subject: Re: Fw: list serve

None in NJ.

Ken

Kenneth.Bossong@judiciary.state.nj.us

----- Original Message -----

From: <JBomster@apslaw.com

Sent: Thursday, September 26, 2002 8:34 AM

Subject: Re: list serve

As to appeals in New Hampshire:

Supreme Court Rule 55 (5) which created the New Hampshire Fund provides "Decisions of the committee as to whether or not to pay claims and the amount of payments shall be within the committee's discretion, subject to the annual limits stated above, and will be reviewable only for clear abuse of discretion. Review of decisions of the committee shall be by a panel of three retired judges, appointed by the New Hampshire Supreme Court, whose decisions shall be final"

The regulation formulated by the Committee and approved by the Supreme Court which deals with appeals provides as follows:

"Part 600 - Appeals. Appeals of the Committee's decision on the merits must be filed with the Supreme Court not later than thirty (30) days from the date of the Committee's notice of decision. Such appeals shall be governed by Rule 10 [Appeal from Administrative Agency] of the Rules of the Supreme Court, except no motion for rehearing or reconsideration shall be required or permitted and (b) such appeals shall be heard finally by the panel prescribed by Rule 55 (5). If an appeal is filed, no payment shall be made to the Claimant until the final order on appeal."

From John Bomster - member, NH Public Protection Fund Committee

----- Original Message -----

From: <miyahira@verizon.net>
Sent: Thursday, September 26, 2002 9:54 AM
Subject: Re: Fw: list serve

The Hawaii Lawyers' Fund provides the right to appeal to both the claimant and the respondent.
Mike Miyahira

----- Original Message -----

From: "Tim O'Sullivan" <tos@nylawfund.org>
Sent: Thursday, October 03, 2002 9:05 AM
Subject: Re: list serve

Janet: In New York, our Regulations allow a claimant to request that the Board reconsider the determination in a claim. After a claim is reconsidered once by the Board, the Trustees' determination is final. While there is no specific provision in our Regulations which allow a respondent to request reconsideration, we did have an isolated incident where our Trustees reconsidered determinations at the request of the respondent. Our Trustees relied upon their general discretion to grant this request.

In New York, there is judicial review of determinations by our Fund in so-called Article 78 Proceedings. While our Regulations do not specifically grant this review, they do refer to judicial review proceedings. We have had a small number of judicial challenges to our determinations in nearly 20 years. We have prevailed in every challenge. Please let me know if you have any other questions.

Tim O'Sullivan
TOS@nylawfund.org

----- Original Message -----

From: "Karen O'Toole" <k.otoole@massbbo.org>
To: <CPR_LAWYERSFUND@MAIL.ABANET.ORG>
Sent: Monday, July 28, 2003 1:42 PM
Subject: No Appeal Rule

Dear All,

If you recently received an e-mail from me on this topic, or responded to my inquiry in June on this topic, please disregard this e-mail. Before Mass. is sued again by a disgruntled claimant, we are hoping to have a "no appeal" rule in place.

According to the ABA Survey (1999 - 2001) only 5 jurisdictions permit appeals from the final decision of a Fund. The Mass. Supreme Judicial Court would like to review "no appeal" rules from other states.

If your state has a SEPARATE and SPECIFIC rule that says (similar to the ABA Model Rule), "There shall be no appeal from a decision of the Board" would you please e-mail a copy of the no appeal rule? If your state does not have a separate no appeal rule (like Mass.) would you please let me know that.

For example, in Mass, the rule states that all decisions of the Board are final, but there is no separate rule that says there shall be no appeal.

Thank you very much for your time and effort. It is greatly appreciated.

Karen O'Toole

----- Original Message -----

From: "Christopher Blanchard" <Christopher.Blanchard@jud.state.ct.us>

To: "NCPO" <ncpo@mybizz.net>

Sent: Tuesday, July 29, 2003 11:11 AM

Subject: RE: No Appeal Rule

Karen- In CT, Practice Book Section 2-75(f) provides, in pertinent part, "The client security fund committee shall, on the basis of the record, make its determination in its sole and absolute discretion as to the validity of claims...". Practice Book Section 2-75(i) provides, "The client security fund committee shall notify the claimant and the subject attorney of its determination, which shall be final and not be subject to review by any court."

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

----- Original Message -----

Subject: RE: No Appeal Rule-California

Dear Karen--sorry it took me so long to respond. Our judicial review started with an Applicant who disagreed with the amount awarded by the State Bar Court Review Department and sued the Bar. His name was Saleeby. Judicial review is costly in many ways, especially in staff resources. The California fund was created by Bar-sponsored legislation in 1972. From 1972-1986 the administration of the program and the decision-making was handled by the disciplinary arm of the State Bar--we are an integrated mandatory bar. In 1985 the Supreme Court of California (our highest court) issued an opinion in Saleeby v. State Bar (1985) 39 C3d 547. One of the main rulings in Saleeby was to grant Applicants the right to review rejections of claims or dispute the amount of the claim in the superior courts of our state through administrative mandamus under 1094.5 of the Cal.Code of Civil Procedure. The opinion was silent on Respondents rights.

The Saleeby decision had a significant impact on the fund in terms of the rulings in Saleeby which required adoption of a well-defined set of rules, as well as procedures and other requirements to satisfy the court. Thus, in response to Saleeby, the Board of Governors took review out of the hands of the disciplinary function of the Bar and adopted new Rules of Procedures, Client Security Fund Matters (patterned after the ABA rules) and created a seven-member Client Security Fund

Commission consisting of public and attorney members. The Board delegated administration of the fund and determinations on claims to the Commission. The Board of Governors also created a 9-member professional staff operating as an independent unit within the bar to assist the volunteer Commission in carrying out its duties.

At this time, Rule 17, based solely on Saleeby, only provided judicial review to an Applicant. However, in the 1991 case, Johnson v. State Bar (L.A. Co. Super.Ct. No. BS 002283) the Respondent Johnson, who had resigned with charges pending, filed a writ challenging a \$200 pay against him. The Bar appealed but the court concluded that a Respondent attorney had a sufficient beneficial interest to challenge the Commission's decision to pay an award in an administrative mandamus proceeding because of significant "financial" and "reputational interests."

I do not believe the Johnson case is published, I will be happy to send you a copy. After the Johnson case, Rule 17 was amended to include Respondents. Our rules have always stated that the Commission's decision constitutes the final action of the State Bar. However, our Office of General Counsel which is within the State Bar, handles all litigation; thus, it is time consuming and expensive and impacts our fund both financially as well as risking bad law. My experience has been that the superior courts "tend" to bend over backwards to assist the petitioner (either an Applicant or a Respondent attorney) and sometimes flip flop the arguments depending on who is before them. The standard of review in the superior court is "substantial evidence." In my personal opinion, even though the court may end up ruling in our favor, the court tends to criticize our rules making the review more like a trial de novo.

Both the Saleeby and Johnson cases were a huge impact on the fund's work. All of the tentative and final decisions have to be written so as to provide findings of fact and conclusions of law to provide an adequate record for superior court review. After Johnson, attorneys were even more likely to file writs due to a 1988 statute requiring Respondents who were suspended, resigned and disbarred to pay the fund back plus interest and costs as a condition of reinstatement; this requirement has caused numerous implementation problems.

FUND BALANCES

----- Original Message -----

From: "Gonzales, Martha" <Martha.Gonzales@calbar.ca.gov>
Sent: Monday, July 29, 2002 3:13 PM
Subject: FW: Fund Balances

I am interested in learning what standard other jurisdictions use in determining what the year-end (calendar or fiscal) fund balance should be in order to ensure the fund's solvency. In California, we have traditionally relied on an actuary's recommendation on what the proper amount of the annual assessment should be for long-term funding given the historical activities of the fund. (e.g. at \$40 per year the fund will be solvent for 10 years given no changes in claims activities) However , the actuary has never addressed a standard for determining what fund balance is appropriate based on the number of claims remaining in the inventory at year-end/beginning of new and number expected for the new year. Thanks.

Martha J. Gonzales
Director
Client Security Fund

----- Original Message -----

From: "William Ricker" <WRicker@Akerman.com>
Sent: Monday, July 29, 2002 3:33 PM

Subject: Re: FW: Fund Balances

Martha: Florida has a reserve fund, but it has nothing to do with actuaries. The annual amount available for claim payments is \$20.00 times the number of attorneys at the beginning of the fiscal year. If there is not enough money in any given year, the claimants simply do not get paid in full. The only thing the reserve fund is for is to ensure that the first \$25,000 is paid to every claimant. We have never had to go into the fund to make that payment.

Bill Ricker

OVERDRAFT NOTIFICATION

----- Original Message -----

From: "Carol Burg" <cburg@state.de.us>
Sent: Monday, July 22, 2002 12:40 PM
Subject: Overdraft Notification

The Delaware Lawyers' Fund just enacted an Overdraft Notification rule. We would be interested in hearing from other states that have such a rule --regarding implementation, operation, and potential pitfalls. Minnesota Overdraft Notification Program

----- Original Message -----

From: Holtaway, John
Sent: Tuesday, October 15, 2002 7:26 AM
Subject: Minnesota Overdraft Notification Program

ANNUAL REPORT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
ANNUAL REPORT OF THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY
(Minnesota June 1, 2001, through May 31, 2002)

J. Overdraft Notification.

Since 1990, banks have been required to report lawyer trust account overdrafts to the Director's Office. The number of reported overdrafts decreased slightly from 113 in 2000 to 98 in 2001. This decrease is similar to those experienced in most recent years. The Director is concerned that bank mergers and turnover have contributed to the decreases in reported overdrafts. In the coming year, the Director intends to send updated reporting agreements and instructions to all approved banks.

During 2001, the Director's Office terminated 98 overdraft inquiries (some of which were initiated in prior years). Ninety-one (91) of the terminations were without a disciplinary investigation; 7 terminations were followed by a disciplinary investigation.

In 2001, two public discipline cases involved trust account overdrafts:

In re DeRycke, 627 N.W.2d 331 (Minn. 2001)

In re Jellinger, 626 N.W.2d 143 (Minn. 2001)

Five other cases arising out of trust account overdrafts resulted in private discipline.

1. Terminated Inquiries

In 44 of the overdraft inquiries terminated without a disciplinary investigation, the Director recommended changes or improvements to the lawyer or law firm. In general, the most common deficiencies discovered in lawyers' trust account books and records are a lack of client subsidiary ledgers and a failure to properly reconcile the trust account. Set forth below are the various causes of trust account overdrafts:

Overdraft Cause	No. of Closings
Bank error	28
Late deposit	18
Mathematical/clerical error	14
Deposit to wrong account	9
Improper/lacking endorsements	7
Service or check charges	5
Check written in error on TA	5
Third party check bounced	3
Bank hold on funds drawn	1
Other	1

2. Disciplinary File Openings

The Director opens a disciplinary investigation when the lawyer's response does not adequately explain the overdraft or significant problems are identified by reviewing the trust account books and records the lawyer submits. During 2001, overdraft inquiries resulted in disciplinary file openings for the following reasons:

Reason for Investigation		
Shortages		2
Grossly inadequate books and records	2	
Response fails to explain OD	1	
Using trust account as personal/business account		1
Disciplinary file already open	1	
Total	7	

3. Time Requirements

Set forth below are the staff time requirements to administer the overdraft notification program:

Attorney	1/00-12/00	240.00 hrs
	1/01-12/01	151.00 hrs

Paralegal and other staff	123.50 hrs
	220.75 hrs

-----Original Message-----

From: Kenneth.Bossong@judiciary.state.nj.us [SMTP:Kenneth.Bossong@judiciary.state.nj.us]

Sent: Tuesday, October 15, 2002 10:56 AM

Subject: Re: Minnesota Overdraft Notification Program

This report should make for interesting reading in any jurisdiction that does not have the Overdraft Notification Rule. For the expenditure of 371.75 staff hours (between 1/5 and 1/4 of a person-year), only 41% of which was attorney time, MN has: 1) opened 7 disciplinary investigations - and we will never know how many of these prevent misappropriation; 2) identified 44 active practices of law needing specific training on trust accounting and recordkeeping, thus presumably preventing sloppiness that could lead to much worse; and 3) by the existence of the program, raised the consciousness of the Bar and the banking industry on the special nature of lawyer trust accounts.

Can there be any doubt that this program is worth it?

Ken Bossong
Kenneth.Bossong@judiciary.state.nj.us

----- Original Message -----

From: Holtaway, John

Sent: Tuesday, November 26, 2002 9:21 AM
Subject: Delaware-Trust Account Overdraft Notification

Read new Rule 1.15A Trust Account Overdraft Notification The Delaware Supreme Court recently has amended the Delaware Lawyers' Rules of Professional Conduct by adding Rule 1.15A-Trust Account Overdraft Notification. The effective date has been extended to January 1, 2003. To read the Order changing the effective date, click here . To read the new Rule, click here .

----- Original Message -----
From: Holtaway, John
Sent: Tuesday, November 26, 2002 9:42 AM
Subject: FW: Delaware-Trust Account Overdraft Notification

Here are the links:

<http://www.dsba.org/postpone.pdf>
<http://www.dsba.org/Rule1.15A.htm>

CATASTROPHIC LOSS

----- Original Message -----
From: Holtaway, John
Sent: Tuesday, January 14, 2003 10:53 AM
Subject: Ken Bossong Inquiry

In making our case for fiscal health for our Funds, one element I've been thinking about is catastrophic loss. Theoretical possibility is one thing; actual experience makes clear that this is something well beyond crying "Wolf!"

Therefore, I'd appreciate receiving facts about real catastrophic losses Funds have faced, with an indication of the outcome for victims and treatments of the matters in the media. Clippings, for example, would be helpful.

Thank you, all.

Ken Bossong
P.O. Box 961
Trenton, NJ 08625-0961

-----Original Message-----
From: Root Edmonson [mailto:REdmonson@NCBAR.com]
Sent: Tuesday, January 14, 2003 3:54 PM
Subject: RE: Ken Bossong Inquiry

Although some might consider this a story of a catastrophic loss, I characterize it as a story about a Fund determined to do the right thing. In 1996, the NC State Bar began an investigation of Hendersonville attorney James H. Toms. Toms soon admitted to embezzling funds from several estates, particularly the Young estate. Toms surrendered his license and was disbarred soon after our investigation started. Due to large losses reimbursed by the NC State Bar's Client Security Fund (the Fund) in 1994, mostly caused by one lawyer, the Fund had asked the NC Supreme Court to create a \$60,000 per claim cap and a \$100,000 per lawyer cap. The cap rules required the Fund to publish a notice in the Hendersonville newspaper that potential claimants had one year from the date of the notice to file a claim with the Fund to be considered for the aggregate cap. The local newspaper also published quotes from heirs of Young that Toms had embezzled over \$500,000 from the Young

estate.

After the one year deadline, claims had been received of over a quarter of a million dollars. However, since two of the claims were large (including the claim of the Young heirs), it appeared that we could abolish the per lawyer cap, raise the per claim cap to \$100,000 and still do justice to the Toms victims for about \$250,000.. The Fund got the Supreme Court to raise the caps. At its meeting in October 1997, the Fund paid \$278,034.66 to the 7 known victims of Toms' misconduct. However, having been advised by another Toms victim that they had not filed a claim since their claim was small compared to the published loss of the Young estate, and because her share of the aggregate would thus be so small, the Board voted to republish notice in the Hendersonville paper that victims would have another opportunity to file claims that would not be subject to the aggregate cap. Many more claims were filed, some of significant value. The Fund was scheduled to meet in October 1998. If the Fund had met in October, there would only have been \$152,000 over the Fund's required \$1,000,000 balance to fund the new Toms claims. However, if the Supreme Court imposed an assessment in its customary October order relating to the Fund, the Board would be able to dip below the minimum balance since an order would be in place that would replenish the Fund balance over the required minimum.

Thus, the Board delayed its meeting until November, and asked the Supreme Court to impose a \$50 per lawyer assessment for 1999. The Supreme Court entered an order imposing the assessment. The Board met in November 1998 and reimbursed the additional Toms victims \$579,635.47. The Fund paid a total of \$857,670.13, or \$50.45 per NC lawyer, to Toms' victims. Under the leadership of former Supreme Court Justice Harry Martin, the Fund found a way to do justice in the face of a catastrophic loss.

-----Original Message-----

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Wednesday, January 15, 2003 10:27 AM
Subject: RE: Ken Bossong Inquiry

We are facing somewhere between \$6m and \$10m in losses as a result of one lawyer. In February and March we begin hearing the first of many claims. I do not know where we will end up. If the Funds runs out of money, the Supreme Judicial Court will be asked to increase attorney annual registration fee. At least that is the proposed plan. Of course the Court could do whatever it wants in terms of providing funding for the Fund. We have not even had preliminary discussions with the Court on this subject yet. We anticipate having a preliminary discussion with the Court in the spring. I will let you know what transpires.

-----Original Message-----

From: William Ricker [mailto:WRicker@Akerman.com]
Sent: Wednesday, January 15, 2003 11:03 AM
Subject: Re: Ken Bossong Inquiry

Florida's system of giving only up to the first \$25,000 of a claim until the end of the fiscal year and then paying the remainder, if any, if funds are available ,has prevented us from being greatly affected by a catastrophic loss. Remember also that we are allocated \$20 per lawyer per year and that is all we get. No reserve fund above that amount. If we had a castastrophe with the number of deserving claimants that would exhaust the \$20 per lawyer per year limit, then as I understand it, the reserve we do have could be used to fund the short fall in the first up to \$25,000 each claimant gets.

----- Original Message -----

From: Marbley Green Janet
Sent: Wednesday, January 15, 2003 12:48 PM
Subject: RE: Ken Bossong Inquiry

This is in response to Ken Bossong's inquiry. Ohio has been faced with catastrophic losses caused by one attorney on at least a couple of occasions. The Supreme Court of Ohio approves our annual budget, therefore I went to them first with the situation, which was highly publicized. The Court wanted to see as many victims as possible reimbursed, and therefore we had no problem getting additional funds allocated. I have periodically reported to them the number of victims reimbursed and the amount, which thus far stands at 26 victims and approx. \$960,00.00. Ohio has a \$50,000 per claim max, but no max per attorney.

Janet Green Marbley
Clients' Security Fund of Ohio

-----Original Message-----

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]
Sent: Wednesday, January 15, 2003 12:14 PM
Subject: RE: FW: Ken Bossong Inquiry

In the case of the Ohio fund, did the extra money help cover as many losses as possible up to the \$50,000 cap or were victims with very large losses able to get more?

-----Original Message-----

From: Marbley Green Janet [mailto:MarbleyJ@sconet.state.oh.us]
Sent: Wednesday, January 15, 2003 12:35 PM
Subject: RE: FW: Ken Bossong Inquiry

All eligible victims were compensated, but no one received more than \$50,000.

Janet Green Marbley
Clients' Security Fund of Ohio

----- Original Message -----

From: Tim O'Sullivan
Sent: Friday, January 17, 2003 4:39 PM
Subject: Re: Ken Bossong Inquiry

In New York, we have been fortunate to have had adequate financial resources to deal with catastrophic losses which have arisen so far. We have never had to take drastic measures or go to the State Legislature seeking additional money to keep our Fund afloat.

When we have had catastrophic losses, our Fund has been creative and found ways to maximize reimbursement to the client victims with financial resources which were available to us in our normal course of operations.

Tim O'Sullivan, NY Fund

CLAIMS JURISDICTION

-----Original Message-----

From: Holtaway, John [mailto:JHoltaway@staff.abanet.org]
Sent: Tuesday, February 25, 2003 8:18 AM
Subject: FW: inquiry for ABA CPR discussion list

Could you please post the following inquiry on the ABA's CPR discussion list? Thanks.

The Trustees of the District of Columbia Bar's Clients' Security Fund are interested in hearing from

other clients' security funds about their jurisdictional rules for a claim:

1) To what extent has your jurisdiction adopted ABA Model Rule 10 of the Model Rules for Lawyers' Funds for Client Protection?

2) Besides a finding that the attorney committed dishonest conduct, does your jurisdiction have any other jurisdictional prerequisites or "triggers" that must occur before the Fund has jurisdiction over a claim? If so, what are they? For example, under D.C. Court of Appeals Rule XII, Sec. 5, and the Fund's Rule of Procedure I.G.5., the Fund may reimburse a claim only when one of the following jurisdictional prerequisites are satisfied: a) the lawyer against whom a claim is filed has died, retired, been disbarred or suspended; or b) the lawyer has been declared by a court to be bankrupt or mentally incompetent; or c) a court has entered a civil or criminal judgment against the lawyer based upon the alleged dishonest conduct at issue.

3) Under Model Rule 10, a fund's trustees make a determination that the attorney's acts constituted dishonest conduct. For those jurisdictions that have adopted Model Rule 10: Have your trustees encountered any difficulties in processing a claim if they have made a finding of dishonest conduct prior to the completion of the disciplinary process (assuming the attorney is involved in a pending disciplinary matter when the claim is being investigated?) If so, what are they, and how have you addressed them?

C. Freudenburg
Director, Attorney/Client Relations Program
The District of Columbia Bar
(202) 737-4700, ext. 238

----- Original Message -----

From: Bob Welden
Sent: Tuesday, February 25, 2003 5:26 PM
Subject: Re: inquiry for ABA CPR discussion list

Hi Carla: 1. Washington has adopted a modified version of Model Rule 10. It is our rule 5, and I attach a copy.

2. We have no "triggers" like you list. I believe that such blanket requirements are totally against the spirit of client protection, and you should note that the McKay Commission report noted the problems with such requirements: " However, the ability of client protection funds to compensate clients is limited. . . . Many client protection funds require a finding of misconduct by the disciplinary agency before a claim will be considered, delaying reimbursement sometimes for years." (The full report is available at http://www.abanet.org/cpr/mckay_report.html). For example, we have a case where a lawyer cheated a vulnerable client out of \$70,000 as a "fee." The lawyer asserted in her disciplinary proceeding that she was incompetent, which automatically caused a disability proceeding to occur before she could be disciplined. She never cooperated with the disability proceeding, and it took years to get all that mess resolved. However, the fund paid the client's claim because it was obvious that the lawyer had acted dishonestly.

3. We have never had any problem caused by approving an application before discipline was resolved. The possible problems that I could foresee would be publicizing the committee's finding of dishonesty, naming the lawyer (particularly if the lawyer had no opportunity for a hearing), and assumedly the lawyer might assert nothing was due if restitution were sought. Those factors need to be kept in mind when considering an independent Board finding of dishonesty.

Bob Welden
General Counsel

Washington State Bar Association
bobw@wsba.org

----- Original Message -----

From: Office of Disciplinary Counsel--Hawaii
Sent: Tuesday, February 25, 2003 8:39 PM
Subject: Re: FW: inquiry for ABA CPR discussion list

Hawaii's answers follow:

- 1) Still have old rule.
- 2) In addition to finding dishonest conduct, an eligible claim must satisfy RSCH 10.3(a).

10.3. Payment of Claims.

(a) Eligible Claims. The trustees may consider for payment all claims resulting from the dishonest conduct of a member of the Bar of this State, provided that:

(1) Said conduct was engaged in while the attorney was licensed member of the Bar of this State; and

- (i) the attorney maintains in the State of Hawai'i an office for the practice of law; and
- (ii) the claimant engaged the attorney's services in the State of Hawai'i; and
- (iii) the dishonest conduct occurred in the State of Hawai'i; and

(2) The claim arises out of an attorney-client or fiduciary relationship customary to the practice of law such as where an attorney acts as an administrator, executor, trustee of an express trust, guardian or conservator, and

(3) The attorney has (one of the following):

- (i) died;
- (ii) been adjudicated a bankrupt;
- (iii) been adjudicated an incompetent;
- (iv) been disbarred or suspended from the practice of law, or voluntarily resigned from the practice of law;
- (v) become a judgment debtor of the claimant, which adjudication shall have been based upon dishonest conduct while acting as specified in Rule 10.3(a)(2) and which judgment or judgments remain unsatisfied in whole or in part;
- (vi) been adjudged guilty of a crime, which adjudication shall have been based upon the dishonest conduct of the attorney; or
- (vii) left the jurisdiction and cannot be found.

3) N/A.

Carole R. Richelieu
Fund Administrator
Lawyers' Fund for Client Protection of the Bar of Hawaii

-----Original Message-----

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Wednesday, February 26, 2003 5:13 PM
Subject: Re: FW: inquiry for ABA CPR discussion list

Carla,

As a matter of threshold jurisdiction, the lawyer against whom a claim is filed must be suspended, disbarred, deceased or convicted of a crime before NJ's Trustees can consider making an award. Fortunately, discipline does not have to be final; temporary suspensions are enough, and Attorney Ethics is vigorous in seeking them in appropriate circumstances. The discipline or conviction need not be for the matter that is the subject of the claim; any suspension permits consideration of all claims properly filed. Separate point: all claimants are required to disclose the facts of their claims to the appropriate prosecutors and ethics committees. Results of your survey would probably, along with the reasons you ask, would make for a good article for the Webb.

Best regards,
Ken Bossong
Kenneth.Bossong@judiciary.state.nj.us

-----Original Message-----

From: Sylvia Stevens [mailto:sstevens@osbar.org]
Sent: Monday, March 03, 2003 11:38 AM
To: 'Holtaway, John'
Subject: RE: inquiry for ABA CPR discussion list

In Oregon, the only jurisdictional requirement is that the loss occurred as the result of or with a lawyer-client relationship with an active member of the Oregon State bar. If dishonesty is established, claims are eligible for reimbursement if the client has obtained a civil judgment or a criminal judgment of restitution or, for losses of less than \$5000, the lawyer was disciplined for the conduct. All of those requirements, can be waived, however, in case of hardship or "special circumstances."

-----Original Message-----

From: Donahue, Eileen [mailto:edonahue@iadc.org]
Sent: Monday, May 05, 2003 3:00 PM
Subject: RE: Re-inquiry for ABA CPR discussion list

I realized I had failed to respond to this inquiry. I apologize for my tardiness.

Illinois has adopted all of the provisions of Rule 10, except Section C which defines dishonest conduct. We have adopted that definition informally, but it is not part of our rules.

As to jurisdictional triggers, our Rule 501(i) requires that the involved lawyer has been disciplined or has died. We have considered claims, however, involving lawyers who are mentally incapacitated (and unlikely to get better).

In general, when a claim involves a lawyer who is not dead or disciplined, our Commission will not consider the claim. If there is a pending disciplinary investigation or proceeding, the claim will remain on hold until that investigation or proceeding is concluded. This does sometimes mean that there can be a lengthy delay in processing a claim. The Commission would consider an exception for a special hardship case, but I don't think we have ever actually proceeded on a claim prior to discipline(or death) except in the rare mental incapacity cases.

If you have any questions about this info, please let me know.

Eileen Donahue

-----Original Message-----

From: John Bomster
Sent: Monday, March 19, 2003 3:00 PM
Subject: RE: Re-inquiry for ABA CPR discussion list

Apologies for the delay:

Payments from the New Hampshire Fund will be made only after the lawyer in questions has been suspended or disbarred from practice; or if the lawyer has died or been judged mentally incompetent before the suspension or disbarment proceedings have been commenced or concluded. See NH Supreme Court Rule 55 (4).

John Bomster/ New Hampshire Public Protection Fund Member.

CLASS ACTION/CLAIMANT CLASS

----- Original Message -----

From: "Holtaway, John" <JHoltaway@staff.abanet.org>
Sent: Wednesday, June 04, 2003 9:57 AM
Subject: D.C. Inquiry-Class Actions

Have any funds received a claim in which the claimants had been certified as a class? If so, how did your Trustees treat the claimants in processing the claim? Did class certification eliminate the requirements that each claimant provide proof of payment to the lawyer, and that each claimant specify the exact amount of his or her loss?

C. Freudenburg
Director, Attorney/Client Relations Program
District of Columbia Bar

-----Original Message-----

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]
Sent: Wednesday, June 04, 2003 1:44 PM
Subject: RE: D.C. Inquiry-Class Actions

This may not be completely analogous, but several years ago the Minnesota Client Security Fund received a claim against an attorney who was court-appointed receiver for a bankrupt company, Flight Transportation Corp. (FTC) In his capacity as receiver, the attorney misappropriated at least \$750,000. See, *In re Bartsh*, 456 N.W.2d 246 (Minn. 1990)(disbarred).

The attorney had been woefully under-bonded by the court without any objection by the creditors' group. A claim was made to our Fund by the lawyer on behalf of the creditors of FTC, who would have been the recipients of this money had it been distributed. The Board denied the claim as lacking an attorney-client relationship; nor was this considered to be a fiduciary relationship that arose out of an attorney-client relationship as required by Minnesota's rule. Even in denying the claim, the Board made

clear that the receivership as an entity would have been the claimant, not each creditor individually as was requested; this is how the Board treats thefts from trusts and estates as well.

-----Original Message-----

From: Ray Bravenec [mailto:rbravenec@TEXASBAR.COM]
Sent: Wednesday, June 04, 2003 1:51 PM
Subject: Re: FW: D.C. Inquiry-Class Actions

In Texas, each person must apply for relief and prove the loss.

Ray Bravenec, Investigator
Office of the Chief Disciplinary Counsel

-----Original Message-----

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Wednesday, June 04, 2003 1:22 PM
Subject: RE: D.C. Inquiry-Class Actions

No, we never have received a class of claimants. There MAY be one that is coming in though, however, there may be no attorney-client relationship between the class and the lawyer.

----- Original Message -----

From: "Donahue, Eileen" <edonahue@iardc.org>
Sent: Wednesday, June 04, 2003 2:37 PM
Subject: RE: D.C. Inquiry-Class Actions

IL has never received a claim dealing with a certified class of claimants.

----- Original Message -----

From: "William Ricker" <WRicker@Akerman.com>
Sent: Wednesday, June 04, 2003 3:28 PM
Subject: Re: Fw: D.C. Inquiry-Class Actions

Carla: as far as I know, Florida has never had a certified class claim made. I think we would insist on individual proof of loss and amount of loss, especially after the reversal of the 145 billion cigarette verdict and class certification on somewhat similar grounds. Depending on the circumstances we might treat the class as a single claimant and limit the recovery to one per incident recovery amount by sending the money to the class representatives and telling them to distribute it (but that is just some association thinking). Bill Ricker

----- Original Message -----

From: "Tim O'Sullivan" <tos@nylawfund.org>
Sent: Wednesday, June 04, 2003 3:49 PM
Subject: Re: D.C. Inquiry-Class Actions

Dear Carla:

In New York, we have never had a claim from a claimant who was certified as a class. If we did, I believe we would still require each member to provide proof of payment and the amount of each individual loss. While not exactly on point, in some situations where we had a large number of similar situated claimants involving the same lawyer we have streamlined our claims process to aid the claimants and lighten the burden on the Fund.

Tim O'Sullivan
tos@nylawfund.org

----- Original Message -----

From: "Christopher Blanchard" <Christopher.Blanchard@jud.state.ct.us>
Sent: Wednesday, June 04, 2003 4:23 PM
Subject: RE: D.C. Inquiry-Class Actions

Connecticut has not received such a claim.

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

-----Original Message-----

From: Kathy Peifer [mailto:kpeifer@palawfund.com]

Sent: Wednesday, June 04, 2003 3:48 PM
Subject: Re: D.C. Inquiry-Class Actions

Pennsylvania has never had a "certified class," however, we had a special situation approximately 5 years ago, which we refer to a pseudo-class action.

The attorney did a lot of asbestosis litigation. He would receive the settlement checks, and in addition to the 40% fee he was entitled to, he kept all of the settlement funds. When his actions were discovered, the money was gone and the number of victims was approximately 1500 - 1800. The attorney filed bankruptcy and the bankruptcy court ordered an audit firm to go in and audit the attorney's records. The audit firm determined whose funds the attorney had received, the amount due the attorney and the amount due the client.

We then prepared a form letter advising of the situation, set forth the auditor's findings and gave the client the option of accepting the information, signing the letter and providing a copy of his/her driver's license or some other photo ID and returning same to the Fund. Upon receipt of the appropriate documentation, we issued an award. We were not successful in reaching all of the victims as some had passed away and some had relocated, etc. This is the only time that we have ever diverted our normal requirement of a separate claim form for each claim.

If you would like any additional information or a copy of the letter that we sent to the victims, please let me know.

Kathryn J. Peifer, Esquire
Executive Director
Pennsylvania Lawyers Fund for Client Security

-----Original Message-----

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]
Sent: Wednesday, June 04, 2003 4:21 PM
Subject: RE: D.C. Inquiry-Class Actions

California had an asbestos case nightmare several years ago. There were about 35 or more defendant companies with the main defendant Johns Manville. We had an attorney who took on hundreds and hundreds of clients and became overwhelmed. At first some of the smaller companies started settling but then when defendants started litigating the lawyer could not handle the clients and was removed by the judge both in Los Angeles and in San Francisco. The problem we had was that none of the victims knew if any settlements were made on their cases. We had so many, many victims but as it turned out there was a clearing house that finally was able to give me names of companies et all that were involved and the settlements. I think we ended up paying one or two small claims but the remaining losses were malpractice. We used a lot of resources on this one however we wanted to let the clients know where they stood and where to call as the court had set up a system for the abandoned clients to get new counsel.

-----Original Message-----

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]
Sent: Friday, June 06, 2003 12:02 PM
Subject: RE: D.C. Inquiry-Class Actions

I also recall a Respondent lawyer who was misrepresenting to his clients that he was putting together a class action case and charged over 200 people about \$250.00 each. Some people gave their money to one person to pay for them and some paid individually and some no longer had receipts. The atty did file an initial petition but it was really a scam just to get lots of people to pay money out.

As long as the client's name was on the petition, we accepted that as proof of payment of the fee. We also had a small class action where the atty stole the money but the amounts had already been determined by the court so it was easy to determine the loss. I am not sure, but if the atty stole just a lump sum, our Commission might just consider dividing it up equally. It would really depend on all the circumstances.

COLLECTIONS

-----Original Message-----

From: Billy King [mailto:bking@lsba.org]
Sent: Monday, January 06, 2003 2:03 PM

Subject: RE: Client Protection Fund, collections

We are looking at procedural changes in the disciplinary system and the legislature to aid in the collection of misappropriated funds by lawyers. Disciplinary judgments would specifically detail the amount misappropriated, the victims of the theft, and the date of the theft. We would go to the legislature to enact legislation to use those specific judgments as prima facie proof in a corresponding civil matter. When suit was filed against the offending lawyer, the case would not have to be re-litigated civilly. All the collection lawyer would have to do is put the disciplinary judgment in the record. The burden would shift to the Respondent to prove that he did not steal the money. Does any state have anything similar to that kind of idea? Your help is greatly appreciated.

Thanks.

William King
Deputy Practice Assistance Counsel
Louisiana State Bar Association

----- Original Message -----

From: Root Edmonson
Sent: Wednesday, January 08, 2003 10:57 AM
Subject: Re: FW: Client Protection Fund, collections

No such thing in NC.

-----Original Message-----

From: Sylvia Stevens [mailto:sstevens@osbar.org]
Sent: Wednesday, January 08, 2003 1:13 PM
Subject: RE: Client Protection Fund, collections

Nothing in Oregon, although I have argued issue preclusion.

----- Original Message -----

From: "Bob Welden" <bobw@wsba.org>
Sent: Wednesday, January 08, 2003 3:14 PM
Subject: Re: Client Protection Fund, collections

Washington does not.

Bob Welden
General Counsel
Washington State Bar Association

-----Original Message-----

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Wednesday, January 08, 2003 3:01 PM
Subject: Re: FW: Client Protection Fund, collections

Nothing like this in PA

-----Original Message-----

From: Peter H Sutton [mailto:PSutton@riemerlaw.com]
Sent: Wednesday, January 08, 2003 2:17 PM
Subject: RE: FW: Client Protection Fund, collections

Hello guys: We have nothing similar in Massachusetts for several reasons. First...the State Constitution provides for a trial by a jury of the lawyer's peers. So while the bar overseers can petition the court to remove the atty, it cant make a monetary award. Next, you guys are shooting yourselves in the foot. While we all agree the lawyer stole the money...the only deep pockets are the malpractice carrier and the lawyers partners (assuming he has any). So when you sue the lawyer...you want to claim some sort of negligence or conflict or breach of duty to get within the policy...and claim his partners were negligent in not supervising etc. If you do it your way...the insurer will claim its a theft and wont even defend...let alone insure...We have had some success getting insurers to pay for these defalcations...so why make it easy for them. Just my thoughts. Peter Sutton

-----Original Message-----

From: Lynda Shely [mailto:Lynda.Shely@staff.azbar.org]
Sent: Wednesday, January 08, 2003 2:08 PM
Subject: RE: Client Protection Fund, collections

In Arizona we asked that our Supreme Court simply include in all of their Judgments and Orders imposing discipline that the respondent, "Repay the Client Protection Fund for all claims paid against the respondent, not to exceed \$100,000." We then can use that as a judgment.

Lynda C. Shely
Director of Lawyer Ethics
State Bar of Arizona

-----Original Message-----

From: MillerFG@aol.com [mailto:MillerFG@aol.com]
Sent: Wednesday, January 08, 2003 1:52 PM
Subject: Re: FW: Client Protection Fund, collections

Dear John: During my time as Counsel and Executive Director of the New York Lawyer's Fund, we successfully petitioned the State Legislature to enact a statute which would permit the disciplinary court to order restitution, which could be entered as a civil judgment against the dishonest attorney. It is routinely used in New York State. Indeed, one of the judgments was enforced against a disbarred lawyer who won a million dollars in the lottery. The provision can be found in section 90 of the New York Judiciary Law. I am sure that Tim O'Sullivan and/or Mike Knight will be glad to help with any inquiries. As I recall, I used a court rule from Arizona as a precedent when I drafted the statute. By the way, this subject will be covered at the Las Vegas Workshop on February 28, 2003. Happy new year to all. -- Fred Miller

----- Original Message -----

From: Kris Wenzel

Sent: Wednesday, January 08, 2003 11:39 AM

Subject: Re: FW: Client Protection Fund, collections

Nothing yet in Wisconsin, however, our committee continues to look at the topic.

----- Original Message -----

From: James Pilon

Sent: Wednesday, January 08, 2003 11:41 AM

Subject: Re: Re: FW: Client Protection Fund, collections

Florida does not. On a hit or miss basis, our Supreme Court will enter a restitution amount in the order for discipline.

-----Original Message-----

From: Gonzales, Martha [mailto:Martha.Gonzales@calbar.ca.gov]

Sent: Thursday, January 09, 2003 3:28 PM

Subject: RE: FW: FW: Client Protection Fund, collections

Nothing like this in California. The legislature has criticized the Bar for the past few years for not being more aggressive in collections activity--the bar's policy has been not to sue the lawyers if judgment proof b/c it is just throwing good money after bad. Making it easy to convert a restitution order to a judgment could be helpful tool; however, although the legislature criticizes the bar it is very difficult to get the legislature to give us additional tools to assist us in collections. There is an issue in California, however, and that is that the vast majority of our payments are made after a resignation or disbarment where the underlying matters are never heard in the discipline court. In addition, for those matters where discipline has been imposed, sometimes the discipline court does not order restitution but the fund will pay anyway or the fund may pay more if it disagrees with discipline.

California law requires the applicant to an independent determination on a CSF claim and an applicant may be paid even if the outcome is different from discipline. We mainly collect by way of forged endorsement actions against banks which is getting more difficult and from Respondents who by statute must reimburse the fund for the amounts paid out, plus interest and costs, as a condition of reinstatement. So even those lawyers who seek reinstatement after a resignation or disbarment and have convinced the discipline court that they are rehabilitated, cannot be reinstated until they pay the fund back in full since it is a "condition" of reinstatement. The discipline court has held that it has no jurisdiction over this statute and cannot waive it or agree to payments, etc.

-----Original Message-----

NYLAWFUND <mjk@nylawfund.org

Friday, January 10, 2003 1:29 PM

As Fred Miller advised you, in New York we have a statutory provision in our Judiciary Law, section 90, 6-a, which allows our Appellate Division in disciplinary proceedings to order restitution to the law client victim, or the Lawyers' Fund, for money or property wilfully misappropriated or misapplied by the lawyer. The court order can be entered as a money judgment against the lawyer in favor of the client or the Fund. The text of this statute is below. Please let me know if you or Bill King would like any other information. Tim O'Sullivan 1-800-442-3863

NY Jud Law

§§ 90. Admission to and removal from practice by appellate division; character committees.

6-a. a. Where the appellate division of supreme court orders the censure, suspension from practice or removal from office of an attorney or counsellor-at-law following disciplinary proceedings at which it found, based upon a preponderance of the legally admissible evidence, that such attorney or

counsellor-at-law wilfully misappropriated or misapplied money or property in the practice of law, its order may require him or her to make monetary restitution in accordance with this subdivision. Its order also may require that he or she reimburse the lawyers' fund for client protection of the state of New York for awards made to the person whose money or property was wilfully misappropriated or misapplied.

b. Monetary restitution, as authorized hereunder, shall be made to the person whose money or property was wilfully misappropriated or misapplied and shall be for the amount or value of such money or property, as found in the disciplinary proceedings. In the event that such person dies prior to completion of such restitution, any amount remaining to be paid shall be paid to the estate of the deceased.

c. Any payment made as restitution pursuant to this subdivision shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment; nor shall any order of the appellate division made hereunder deprive a criminal court of any authority pursuant to article sixty of the penal law.

d. An order issued pursuant to this subdivision may be entered as a civil judgment. Such judgment shall be enforceable as a money judgment in any court of competent jurisdiction by any person to whom payments are due thereunder, or by the lawyers' fund for client protection where it has been subrogated to the rights of such person.

e. Where an attorney or counsellor-at-law is permitted to resign from office, the appellate division may, if appropriate, issue an order as provided herein requiring him or her to make payments specified by this subdivision.

f. Notwithstanding any other provision of this subdivision, no order may be issued hereunder unless the person required to make payments under such order first is given an opportunity to be heard in opposition thereto.

CREDIT CARD PAYMENTS

----- Original Message -----

From: "Sylvia Stevens" <sstevens@osbar.org>
Sent: Thursday, September 19, 2002 10:47 AM
Subject: Credit Card Payments

Does anyone have any authority about how credit card payments should be handled? We have a continuing debate here about whether the payments should be deposited to trust (even if the payment is for earned fees) or into the lawyer's business account. The practical problem is that banks generally require that all credit card payments be processed through one account.

Some lawyers find it easier to deposit the payment into a business account from which the bank can charge the associated fee, then transfer "retainers" and other unearned deposits into trust. Others argue that the payments should go into trust, that the lawyer should transfer sufficient funds to cover bank charges, and then transfer out of trust anything that represents earned fees. Thoughts???

Sylvia E. Stevens
Oregon State Bar
Assistant General Counsel

----- Original Message -----

From: Holtaway, John
Sent: Thursday, September 19, 2002 11:34 AM

Subject: Re: Credit Card Payments

Missouri Ethics Opinion 20000202

Opinion 20000202 (9/00-10/00) Credit cards; Trust accounts; Client funds and property. A lawyer wants to accept credit card payments for retainers, advance fees, and earned fees through a credit card company that requires that the lawyer have one account in which to deposit all charged funds.

To comply with

the ethics rules, the lawyer should have the funds deposited into a trust account and then promptly remove any amounts that represent fees already earned. To ensure prompt removal, the lawyer must either receive notice from the credit card company that the funds have been deposited or check with the bank frequently to determine whether the funds have been deposited. The lawyer should inform the client of the manner in which the funds will be handled and explain that the amount deposited will be less than the amount charged, due to the credit card company's fees. The lawyer should also explain to the client whether the lawyer will credit the client with the full amount or the amount actually deposited.

----- Original Message -----

From: Holtaway, John

Sent: Thursday, September 19, 2002 11:20 AM

Subject: Re: Credit Card Payments

Kansas Ethics Opinion 01-02

Rules 1.6, 1.7, 1.9.

Opinion 01-02 (8/27/01) Fees; Credit cards; Trust accounts. When a lawyer accepts credit card payments from clients and the credit card company requires that all funds be deposited into one account, the funds should be deposited into the lawyer's trust account. Funds representing fees already earned should promptly be removed from the trust account. The lawyer should inform the client of the manner in which the funds will be handled once they are deposited into the account, including whether the credit card fees will be charged to the client. Rule 1.15.

----- Original Message -----

From: Dan H.

Sent: Thursday, September 19, 2002 12:08 PM

Subject: Re: Fw: Credit Card Payments

While lawyers have a duty to refund unearned portion of fees paid, In New Jersey fees paid in advance must go into the business account and not the trust account R.1:21-6(a)(2). I would take that to mean the credit card payments. The rationale is that it would create commingling of fees with fiduciary monies. I have attached a copy of the Opinion Letter 124 that states that only fees can be deposited in the business account, indeed, they must be deposited only in the business account.

Dan Hendi

----- Original Message -----

From: Kenneth.Bossong@judiciary.state.nj.us

Sent: Thursday, September 19, 2002 12:51 PM

Subject: Re: Fw: Credit Card Payments

Quick thought: If account chosen to accept credit card payments is an attorney trust account, lawyer must be careful to ensure that credit card fees don't put him or her out of trust. Subsequent contesting of the charge by the cardholder could also present problems. Other issues might arise from the fact that practicing lawyers are not mere vendors.

Ken

Kenneth.Bossong@judiciary.state.nj.us

----- Original Message -----

From: Root Edmonson

Sent: Thursday, September 19, 2002 1:04 PM

Subject: Re: Credit Card Payments

In NC, we first addressed this issue in RPC 247. We addressed the issue of credit card charge-backs in 97 Formal Ethics Opinion 9. I will attach both to this message.

----- Original Message -----

From: "Bob Welden" <bobw@wsba.org>

Sent: Thursday, September 19, 2002 1:25 PM

Subject: Re: Credit Card Payments

I asked our auditor (who conducts our random audit program) whether we have a position on this. Here is her reply that you may find interesting:

Yes, we have, although I am not aware of any "rule" or written RPC Committee opinions explaining it. We have always treated credit card payments the same as any other deposits. If it is a trust payment (i.e., client funds), it goes in trust. If it earned fees, it goes in the general account. That means that lawyers may have to have two merchant accounts for credit cards - one for the trust account and one for the general. The following statement/assumption is INCORRECT:

"The practical problem is that banks generally require that all credit card payments be processed through one account."

This is not true. Banks and credit card companies are not knowledgeable about the special requirements of lawyers, but once you tell them you must have two separate merchant accounts, they can and will set that up for you. It may mean you have to pay twice the monthly fees, which most lawyers grumble about (because it is more cost effective and convenient to have only one merchant account), but that's the way it is. We make lawyers in Washington State set up two accounts. They do it, and it works fine. We do not allow commingling back and forth as described below.

Hope this helps.

Bob Welden
General Counsel
Washington State Bar Association

-----Original Message-----

From: Ginty, Patrick Sean

Sent: Thursday, September 19, 2002 3:57 PM

Subject: RE: Credit Card Payments

Dear Ms. Stevens:

I am in receipt of your e-mail message of 09/19/02. In response to your inquiry, I first refer you to ABA Formal Ethics Opinion 00-419, which I have included directly below:

American Bar Association Formal Ethics Opinion 00-419 American Bar Association
USE OF CREDIT CARDS FOR PAYMENT OF LEGAL FEES; WITHDRAWAL OF FORMAL

OPINIONS 320 (1968) AND 338 (1974) AND INFORMAL OPINIONS 1120 (1969) AND 1176 (1971)

July 7, 2000

The Committee has learned that inquiry frequently is made of the Association's ETHICSearch Research Service regarding the propriety of lawyers permitting or encouraging clients or potential clients to use credit cards to pay their legal fees and/or expenses. Review of several of the Committee's opinions addressing this subject reveals that the advertising provisions of the ABA Model Rules of Professional Conduct, adopted in 1983, render inapplicable prohibitions or requirements that were contained in Formal Opinion 338 (November 16, 1974); Formal Opinion 320 (February 19, 1968); Informal Opinion 1120 (October 3, 1969), and Informal Opinion 1176 (February 4, 1971).

Formal Opinion 338, although not formally withdrawing Informal Opinions 1120 and 1176, had rejected their reasoning that credit cards or other bank-financing arrangements properly could be employed only for "facilitating the sales of merchandise and sales of non-professional services," and not for legal services; in so doing, the Committee accepted, per se, the propriety of using credit cards to pay legal fees. However, Opinion 338 carried forward from another earlier opinion, Formal Opinion 320 (Legal Fee Finance Plan), a series of requirements that are not justified by the present-day Model Rules of Professional Conduct.

Because the Model Rules require only that any advertising materials used by a lawyer not be false, fraudulent, or misleading, and because they do not require any advance approval by a bar association for a lawyer's participation in a credit-card plan, the Committee hereby withdraws each of the four opinions referred to above.

ABA Formal Op. 00-419
END OF DOCUMENT

I have also attached copies of digests of state bar ethics opinions as they appear in the ABA/BNA Lawyers' Manual on Professional Conduct that may be of interest.

For further information on your inquiry, I refer you to the ABA/BNA Lawyers' Manual on Professional Conduct. The Manual has digests of thousands of state and local bar association ethics opinions as well as articles on current developments in professional responsibility. The Manual is very widely available in law libraries and is also available on Westlaw in the database ABA-BNA.

For your reference, I have attached a copy of a bibliography of ethics research materials (bib.wpd) that are very widely available in law libraries, and a hypertext link to an annotated list of internet ethics research sites located on the ABA Center for Professional Responsibility web site.

I have also attached information about ETHICSearch (esrchbro.wpd), the ABA Center for Professional Responsibility (cprinfo.wpd), and a membership application for the Center (Applicat.wpd).

You may also find the following Westlaw databases to be of interest:

ABA-BNA (The ABA/BNA Lawyers' Manual on Professional Conduct)
METH-EO (The full text of ethics opinions from approximately 20 states)
METH-CS (state caselaw that focuses on ethics and professional discipline)
ETH-TP (a collection of law review articles/publications that focus on legal ethics)
ABA-MRPC (The ABA Model Rules of Professional Conduct).

I hope this is helpful. Please send me a return e-mail or call me at (312) 988-5302 if you have any questions.

Sincerely,
Patrick Sean Ginty
ETHICSearch
ABA Center for Professional Responsibility (206) 727-8232

----- Original Message -----
From: Kenneth.Bossong@judiciary.state.nj.us
To: Mike Knight
Sent: Wednesday, October 09, 2002 8:05 AM
Subject: Re: Fw: Credit Card Payments

If you received some interesting replies to this inquiry, it would make a good article for the Webb.

Best regards,

Ken

Kenneth.Bossong@judiciary.state.nj.us

ESCROW DISBARRED LAWYERS

Tim -

Bob Welden asked me to respond to your inquiry regarding Washington's rule for taking control of the escrow funds of disciplined lawyers. Our rule is Rule for Lawyer Discipline 8.6, that does allow appointment of a lawyer who can assume control of the trust accounts of a lawyer that has been transferred to disability inactive, suspended or disbarred, or a lawyer who disappears or dies. We have a set of rule changes that are currently pending at our Court. There is no jurisdictional change in the pending draft, but a number of procedural changes. Let me know if you want to see the draft. Our Court will likely act on the changes this fall.

Here's the existing rule:

RULE 8.6 APPOINTMENT OF COUNSEL TO PROTECT CLIENTS' INTERESTS

(a) Appointment. Whenever a lawyer has been transferred to disability inactive status, suspended, or disbarred, and fails to carry out the obligations of this rule or fails to protect his or her clients' interests, or whenever a lawyer disappears or dies, the chairperson of the Board may appoint a lawyer or lawyers to protect the clients' interests, unless a partner, personal representative or other responsible person appears to be properly protecting those interests. The appointment shall be made upon application of the Association or any interested party and upon proper proof of facts. The appointed lawyer or lawyers shall take possession of the necessary files and records and take such action as seems indicated to protect the clients' interests or required under these rules. Such action may include but is not limited to assuming control of trust accounts or other financial affairs. Any bank or other person honoring the authority of the appointed lawyer or lawyers shall be exonerated from any liability resulting therefrom.

(b) Costs. Payment of any costs incurred by the Association pursuant to this rule may be made a condition of reinstatement of a disbarred lawyer or a lawyer transferred to disability inactive status, or may be ordered as restitution in a disciplinary proceeding brought against a suspended lawyer for failure to comply with rule 8.1.

Randy Beitel
Senior Disciplinary Counsel
Washington State Bar Association

FINDINGS OF FACT

----- Original Message -----

From: <Tonimoss@aol.com>

Sent: Tuesday, June 10, 2003 7:18 AM

Subject: finding of fact

Need input as to what other funds do as to the "finding of fact" in your claims. we are about to start this procedure for all claims and would like some advice as to how to proceed. we do not have hearings as such. our trustees decided a claim as to denied or accepted. we must now do a "finding of fact" for each of these claims to satisfy any appeals taken with the courts. thanks for your help.....janet moss

-----Original Message-----

From: Karen O'Toole [mailto:k.otoole@massbbo.org]

Sent: Tuesday, June 10, 2003 9:22 AM

Subject: RE: finding of fact

Even though we have administrative hearings, the Board does not make findings of fact. The Board's counsel provides detailed memoranda that are heavily relied upon by the Board members, but the Board does not make findings. We do write up minutes of each hearing matter and these do contain

the salient facts and the basis for finding a defalcation and then the subsequent award. The lack of findings does present a problem when a matter is appealed. But the Board has consistently wanted to make the record as brief as possible and has rejected the idea of making findings of fact.

-----Original Message-----

From: Cole, Marty [mailto:Marty.Cole@courts.state.mn.us]
Sent: Tuesday, June 10, 2003 9:48 AM
Subject: RE: finding of fact

Minnesota's approach is somewhat similar. A fairly detailed factual summary is prepared by staff in the claim report provided to the board members before the meeting. In the minutes of the meeting, as to each claim, we then include "The board adopted the following findings:" -- then either insert entire factual summary, or a slightly shortened version with the material facts that support the decision. This makes for somewhat lengthy minutes, which once approved at the next meeting become final.

-----Original Message-----

From: Kathy Peifer [mailto:kpeifer@palawfund.com]
Sent: Tuesday, June 10, 2003 10:28 AM
Subject: Re: finding of fact

Pennsylvania does not do a "finding of fact" as decisions of our Board are discretionary. There is no right of recovery. Two appeals to our Board's decisions have been filed in the 20 year history of the Fund. One was dismissed in federal court; the other is currently pending in our state supreme court, which we expect will be dismissed in due course. Sorry I couldn't be of help.

Kathryn J. Peifer, Esquire
Executive Director
Pennsylvania Lawyers Fund for Client Security

-----Original Message-----

From: Sylvia Stevens [mailto:sstevens@osbar.org]
Sent: Tuesday, June 10, 2003 10:57 AM
Subject: RE: finding of fact

In Oregon we don't hold hearings either. The committee member who investigates the claim prepares a written report with findings and conclusions. The committee minutes also reflect the basis for paying or denying the claim. When a claim is recommended for payment, Board of Governors approval is required, so a memo is prepared for the Board (by me) explaining the facts of the claim and the committee's decision process. There are also minutes of the BOG meeting to reflect the decision. This may not apply to the trustee situation where further approval is not required, but we have quite a paper trail under our system!

----- Original Message -----

From: "Office of Disciplinary Counsel--Hawaii" <odc@lava.net>
Sent: Tuesday, June 10, 2003 3:14 PM
Subject: Re: finding of fact

While we set out "facts" in our investigative report, our Trustees vote yea or nay only on the recommendation.

Carole R. Richelieu
Fund Administrator
Lawyers' Fund for Client Protection

of the Bar of Hawaii

----- Original Message -----

From: "Gonzales, Martha" <Martha.Gonzales@calbar.ca.gov>
Sent: Tuesday, June 10, 2003 5:37 PM
Subject: Re: finding of fact

In addition to judicial review, our applicants and respondents first have the right to object to our Commission's first decision, which is called a "tentative decision" which is prepared by fund attorneys. This tentative decision serves a dual purpose, it provides a summary of the facts, and 2) it is drafted as the Commission's determination of the facts involved and the actions it proposes to take. It is composed of two parts: Findings of Fact and a Conclusions of Law. Because this document also serves as a summary of the facts involved it is not a true Findings of Fact such as would be drafted by a trial court. Disputed information may be contained in the Findings of Fact and the Conclusions of Law.

Because of the volume of applications that we receive, this hybrid format was found to be the most effective means of providing the Commission with a summary of all the salient points of the case without having to draft two separate documents. (Before we were required to have findings of fact, the staff wrote memos to the decision making body.) At its meeting, the Commission may agree with the tentative decision, ask for changes, or change the decision altogether, although most tentative decisions are accepted with no or little change). The tentative is then served on the parties with notice that they have 30 days to object. If no objections are received, the tentative decision automatically becomes the final decision. If we receive objections from either party--either may also may ask for an oral hearing--the application with all supplemental information then goes back to the Commission for a review. After review at its meeting, the Commission advises staff of its decision to change the decision or stay with the tentative or grant a request for an oral hearing (rarely granted). A final decision is then issued summarizing the objections and the Commission's decision and that final decision is then served on the parties and is reviewable in the superior courts by way of a writ of mandamus.

----- Original Message -----

From: MillerFG@aol.com
Sent: Tuesday, June 10, 2003 5:11 PM
Subject: Re: Findings of fact

Janet: Why has the Maryland Board of Trustees decided to require findings of fact in all its determinations awarding or denying reimbursement? That could be a very onerous, expensive, and cumbersome procedure. And maybe unnecessary too.

Note that Model Rule 11 (C) (of the ABA's Model Rules for Client Protection Funds) provides that: "The claimant shall have the responsibility to complete the claim for and provide satisfactory evidence of a reimbursable loss."

If a claim is denied, a recital that "the claimant has not provided satisfactory evidence of a reimbursable loss" would be the legal determination of the Board of Trustees for subsequent judicial review purposes.

Best regards, Fred Miller

-----Original Message-----

From: Carla Freudenburg [mailto:CFreudenburg@dcbbar.org]
Sent: Tuesday, June 10, 2003 4:46 PM

Subject: RE: finding of fact

Hi Janet,

In D.C., the investigating Trustee prepares a written report with findings and conclusions, and the minutes also reflect the basis for approving or denying a claim (similar to Oregon's approach).

Under our rules, a hearing may be held, but to my knowledge, there has never been a hearing. In addition, payment of claims is not subject to approval by the Bar's Board of Governors, or the Court of Appeals. The Trustees' Notice of Decision reflects the dishonest conduct alleged, whether other remedies were exhausted, whether the loss was uninsured, and the decision to pay or not pay the claim.

----- Original Message -----

From: <JBomster@apslaw.com

Sent: Wednesday, June 11, 2003 11:02 AM

Subject: Re: finding of fact

John Holtaway: Rather than summarize the NH Fund approach, there follows the Committee Regulation implementing the Supreme Court Rule establishing the Fund. The regulation has been approved by the Supreme Court. Regards: John Bomster

500.05 Availability of Hearing. A contested hearing on the merits shall be held on the Committee's own initiative or upon the request of the claimant or of the Accused (if the Accused is a party). However, hearings in uncontested cases will be held only at the Committee's discretion. Hearings on matters that do not involve the merits of the claim will be held only at the Committee's discretion.

500.06 Commencement of Hearing. A hearing on the merits shall be commenced by a notice from the Committee to the parties of the date of any scheduled hearing.

500.07 Notice of Hearing. The notice of a hearing on the merits shall be issued by the Committee no less than fourteen (14) days prior to the scheduled hearing. The notice shall contain the information stated below:

- (a) a statement of the time, place and nature of any hearing;
- (b) a statement of the legal authority under which a hearing is to be held;
- (c) a statement of the claimant's name and the name of the Accused;
- (d) a statement that each party has the right to have an attorney or person of good character present to represent the party at the party's expense.

A copy of the notice shall be sent by certified mail and regular first class mail to the claimant at the address indicated in the claimant's claim form and to the Accused, if a party, at the last address on file with the Committee.

500.08 Postponements. Postponements are disfavored. If a postponement is requested by a party to the hearing, it shall not be granted unless the Committee determines that good cause has been demonstrated. Good cause may include the unavailability of the claimant or witnesses or attorneys necessary to conduct the hearing. The Chair shall issue a new hearing notice stating the date, time and place of the postponed hearing as soon as practicable. In such a case, fourteen days advance notice of the new hearing date is not required.

500.09 Failure to Attend Hearing. If any party to whom notice has been given in accordance with section 500.07 fails to attend a hearing, the Committee may decide the claim on the basis of the information before it; or reschedule the hearing; or deny the claim; or take any other action the Committee deems appropriate.

500.10 Disclosure of Witnesses and Exhibits. At least 5 days before the hearing on the merits in contested cases the parties shall exchange a list of all witnesses to be called at the hearing, with a brief summary of their testimony, a list of all documents or exhibits to be offered as evidence at the hearing and a copy of each such document or exhibit. At the same time, the parties shall file such lists, summaries and exhibits with the Committee.

500.11 Confidentiality. Upon request of the claimant only, the Committee shall close the hearing on the merits to the public, and the Accused's objection to the claim and all evidence submitted at the hearing shall be confidential. However, the claimant's claim form shall always be available to the public, as well as the Committee's decision on the merits. This regulation shall not be interpreted to deny access to relevant information by professional discipline agencies or law enforcement authorities as the Committee shall authorize, or the release of statistical information which does not disclose the identity of the Accused or the parties.

500.12 Record of the Hearing. Upon request of a party, a record of the hearing shall be kept by tape recording or other method that will provide a verbatim record. The Committee shall determine the method of recording. If any party requests a copy of the record, the Committee shall cause a copy of the record to be prepared upon payment of the fully distributed cost of the recording.

500.13 Standard and Burden of Proof. The claimant shall bear the burden of proving each element of the claim, including the amount of the claimant's loss, by a preponderance of the evidence.

500.14 Testimony; Order of Proceeding. Any person offering testimony, shall first swear or affirm that the testimony shall be true and shall state for the record his or her name, and role in the proceeding. If the person is representing another person, the person being represented shall also be identified. Testimony shall be offered in the following order:
(a) the claimant and such witnesses as the claimant may call;
(b) the Accused, if a party, and such witnesses as the Accused may call.

500.15 Evidence. The New Hampshire Rules of Evidence shall not apply. All testimony, documents, materials and objects offered as evidence shall be admitted into evidence unless excluded by the presiding officer as irrelevant, immaterial, unduly repetitious or legally privileged. All objections to the admissibility of evidence shall be stated no later than the time when the evidence is offered, or the objection will be deemed waived .

500.16 Closing the Record. After conclusion of the hearing, the record shall be closed and no other evidence shall be received into the record, except as allowed by this section and section 500.17. Before the conclusion of the hearing, a party may request that the record be left open to allow the filing of specified evidence not available at the hearing. If the Committee determines that such evidence is presently unavailable and is necessary for a full consideration of the issues raised at the hearing, the Committee may keep the record open for the period of time necessary for the party to file the evidence. Unless the Committee specifies a different time limit, such additional evidence shall be filed no later than 15 days after the conclusion of the hearing.

500.17 Reopening the Record. At any time prior to the issuance of the decision on the merits, the Committee, on the Committee's own initiative or on the motion of any party, may reopen the record to receive relevant, material and non-duplicative testimony or other evidence not previously received and unavailable at the time of the hearing, if the Committee determines that such testimony or other evidence are necessary to a full and fair consideration of the issues to be decided.

500.18 Decision on the Merits. A Committee member shall not participate in making a decision on the merits of a contested claim without having personally heard the testimony in the case, unless the matter's disposition does not depend on the credibility of any witness and the record provides a reasonable

basis for evaluating the testimony. The Committee's decision on the merits shall be in writing and shall contain a statement of the reason(s) for the claim's approval or denial.

----- Original Message -----

From: "Tim O'Sullivan" <tos@nylawfund.org>
Sent: Wednesday, June 11, 2003 11:20 AM
Subject: Re: finding of fact

Janet:

In New York, our procedure is similar to several other replies I have seen to your inquiry. The staff prepares a memorandum setting forth the facts and concludes with a recommendation which is that an award of \$ be approved or that the claimant has failed to provide satisfactory evidence of an eligible loss. This final determination is what is reviewable in an Article 78 judicial review proceeding. We do not get bogged down in formal findings of facts or cumbersome procedures. We have found it best to keep it simple.

Tim O'Sullivan
NY Fund

----- Original Message -----

From: Gonzales, Martha
Sent: Wednesday, June 11, 2003 11:17 AM
Subject: RE: Findings of fact

I agree with Fred's points. Unfortunately, in CA we had no choice since our highest court ordered us to provide findings of fact for a meaningful review if a superior court writ were granted. This is a 1985 case Charles Saleeby v. The State Bar of California (39 Cal.3d 547). Our process in CA is expensive. We need a staff of 9 (was 14 until we were downsized) to do all the work plus it is a lot of work for our Commission and General Counsel's office if we get sued. We received 1300 applications last year. The Saleeby case also prohibited the bar from requiring attorneys to assist victims pro bono. The Court essentially treated our fund as if it were an administrative agency of the State. One good thing, however, and knock on wood, we are not subject to the State of California's Administrative Procedures Act. What is interesting is that we are still considered a discretionary fund and no applicant has a right to reimbursement.

----- Original Message -----

From: <Tonimoss@aol.com>
Sent: Thursday, June 12, 2003 6:26 AM
Subject: Re: Fw: Findings of fact

fred, we are in the process of a hearing on the Lye Ong Case. this case was originally sent to the court of appeals and they have since decided that all of our cases on appeal shall be held in the circuit court where claimant resides, works, etc. we went to a hearing in the circuit court and the court decided to allow the trustees to formally submit a "finding of fact" along with exhibits to the court. we intend to do so at our next meeting to meet the request of the court. after discussion the chairman feels that because of the wording of the court of appeals, anyone can file an appeal on our claims now including the attorney who stole the money to begin with. as such she feels that we should adopt this policy on any and all claims to protect ourselves from having to go back 90 days later and try to reconstruct the discussion of the claim. onerous (i like that word), expensive and cumbersome, i agree and so do the trustees. but what can we do. our court of appeals has decided that all appeals are now going to the circuit court so we are on the bandwagon, at least for now. we feel that it will open a pandora's box, especially as to prisoners because this gives them a day out of jail and we need to retain counsel and also to appear in the circuit court on the funds behalf. mr hecht attempted about a year ago to get the trustees to deny claims on the basis of the "claimant not providing satisfactory evidence of a reimbursable loss" but the trustees at that time nixed the idea, especially mr reid.

anyway i believe we are here for the long.....haul so i just keep plugging away and asking for advice from anyone who will give it.
thanks fred.....

-----Original Message-----

From: Kenneth.Bossong@judiciary.state.nj.us
[mailto:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Monday, June 16, 2003 3:18 PM
To: Holtaway, John
Subject: Re: FW: finding of fact

Janet,

While NJ has traditionally been quite willing to engage in reasonably requested reconsideration, the Fund Trustees' decisions are not reviewable. We make no official findings of fact, as such. The Trustees do make findings as to the three essential elements of a successful claim: that is, whether the claimant has made a sufficient showing of -

- (1) attorney/client or fiduciary relationship;
- (2) dishonest conduct; and
- (3) actual loss.

These are the findings mentioned in announcing the disposition of claims.

Ken Bossong

INVESTMENT SCHEME

----- Original Message -----

From: "Donahue, Eileen" <edonahue@iardc.org>
Sent: Monday, July 01, 2002 7:53 AM
Subject: Investment claims

The Illinois fund has received some claims related to a certain investment scheme. In this scheme, the investors would put up \$125,000, and within one month they would receive the return of the investment and \$500,000. Naturally, it was too good to be true and the operators are now in federal prison. In discussions at ABA Forums and NCPO workshops, I have heard other funds say that they deny claims involving such unrealistic investments. Could I hear from other states that have denied claims involving unrealistic investment schemes (assuming claims are otherwise eligible), and let me know your rationale and how you would explain it to a claimant.

I appreciate your help, Eileen Donahue

----- Original Message -----

From: "Bob Welden" <bobw@wsba.org>
Sent: Monday, July 01, 2002 8:51 AM
Subject: RE: Investment Scheme Inquiry

We had something similar where a lawyer and another guy cooked up a scheme to sell "prime bank debentures" (which don't exist). The promise was that the investor would pay \$100,000 (plus a \$10,000 fee) and would receive back 25 monthly payments totaling \$25,000,000. The committee determined that none of the "investors" invested their money because they had an attorney client relationship, and also that anything that obviously too-good-to-be-true was not going to be compensated from the Fund.

Bob Welden
General Counsel
Washington State Bar Association

----- Original Message -----

From: William Ricker

Sent: Monday, July 01, 2002 9:04 AM

Subject: Re: Investment Scheme Inquiry

Eileen: we deny investment schemes unless the money was in the attorney's possession for some other reason and he was merely acting as a conduit when he stole the money. The money must be stolen by the attorney not just lost through a bad investment. Your scenario sounds like it was a pure investment concept and even if the attorney stole the money we would not pay. Clients do not go to lawyers as investment advisors.

----- Original Message -----

From: Kenneth.Bossong@judiciary.state.nj.us

Sent: Monday, July 01, 2002 10:16 AM

Subject: Re: Investment Scheme Inquiry

Hi, Eileen and All,

Is it me, or are these getting nuttier by the day? Assuming the claims are otherwise compensable assumes a lot, since these are typically rife with A/C relationship and dishonest conduct issues. It has the advantage, though, of making my reply MUCH shorter. :)

One of the factors NJ's Trustees shall consider in deciding which eligible claims merit reimbursement is "The degree of negligence, if any, of the claimant which may have contributed to the loss".

R.1:28-3(b)(4).

Lumped in with garden-variety negligence (e.g. ignoring obvious warning signs, even prior thefts) in this analysis are greed and unclean hands. Assuming we got this far, it is not impossible that we'd pay these from what you've told us so far, but it is highly unlikely that the initial impression of negligence and greed would be overcome. A hearing would have to yield unusual and compelling circumstances.

Ken

Kenneth.Bossong@judiciary.state.nj.us

----- Original Message -----

From: Michael D. Miyahira

Sent: Monday, July 01, 2002 10:17 AM

Subject: RE: Investment Scheme Inquiry

Eileen,

We've had our share of investments gone bad. We decline them primarily on the basis that they lacked an attorney - client relationship. One of our fundamental criteria. One goes to attorney for legal matters. One should go to an investment counselor for investments. And investment scams are like going to Vegas. You take your chances but the "house" usually wins.

We recently had one claim that was based on a long standing attorney - client relationship that had turned into an estate management arrangement. In this case, our trustees had a difficult time as we believed that the claimants should have been more knowledgeable about investment matters, especially with an estate their size. However the history and linkage behind the progression from handling the legal matters of the estate to the actual management of the investments made it a difficult decision. In the end, we decided to make an award however some of us were still troubled about whether the claimants were as naive as they claimed to be.

Michael D. Miyahira

----- Original Message -----
From: Marbley Green Janet
Sent: Monday, July 01, 2002 11:09 AM
Subject: RE: Investment Scheme Inquiry

Ohio does not pay claims involving investment schemes. Our analysis is that such claims lack the attorney/client relationship required by our rule. The only time we would probably pay such a claim would be where the attorney obtained a settlement or other large sum of money for a client and then convinced the client to invest the money in something that turned out to be fraudulent.

----- Original Message -----
From: <Tonimoss@aol.com>
Sent: Monday, July 01, 2002 2:12 PM
Subject: Re: Investment Scheme Inquiry

Maryland would not pay on the investment scheme as our regulations specifically state that we do not pay this type of claim. butif there was a long standing relationship with the attorney and he had obtained the funds legitimately and then offered to invest this money for some "not very wise person, who did not know better and should not have known better" then I believe we would have considered it. but it would be a hard sell for my trustees to pay this kind of claim....hope this helps....janet moss

----- Original Message -----
From: Tim O'Sullivan
Sent: Tuesday, July 23, 2002 10:37 AM
Subject: Re: Investment Scheme Inquiry

Eileen:
In New York, we have never denied an otherwise eligible investment claim on the sole basis that the alleged investment was "unrealistic". For investment claims, our Trustees require that the loss arose out of an attorney-client relationship, and that the lawyer misappropriated the client's investment. Among the various factors our Trustees would weigh is whether the claimant was greedy. Certainly, your claimants sound greedy, and our Trustees would weigh this against them as one factor in the consideration of the claim. But we have never denied an eligible claim solely on the basis of a claimant being greedy in an unrealistic investment. I would be interested in hearing how your Board resolves the claims. Thanks, Tim O'Sullivan

-----Original Message-----
From: William Ricker [SMTP:WRicker@Akerman.com]
Sent: Tuesday, July 23, 2002 2:59 PM
Subject: Re: Fw: Investment Scheme Inquiry

Eileen: I think Florida would deny the claim on the unreasonableness basis but also because I do not see the loss arising out of an attorney client relationship. It is not good enough that the escrow holder is an attorney there must be the equivalent of a "pre-existing" attorney client relationship unrelated to the investment scheme.

----- Original Message -----
From: "Bob Welden" <bobw@wsba.org>
Sent: Tuesday, July 23, 2002 1:21 PM
Subject: RE: Fw: Investment Scheme Inquiry

I think it would be similar in Washington. First, in any investment, there must be an existing attorney/client relationship. It's not enough that the promoter is a lawyer; the client must have gone to

the lawyer for something involving the practice of law. Second, the greed factor does weigh into the decision I'm sure, though I've never heard anyone say so exactly. But I think there is a general feeling that the Fund ought not be used to protect people from their own foolishness.

Bob Welden
General Counsel
Washington State Bar Association

-----Original Message-----

From: Gonzales, Martha [SMTP:Martha.Gonzales@calbar.ca.gov]
Sent: Wednesday, July 24, 2002 11:14 AM
Subject: RE: FW: Fw: Investment Scheme Inquiry

As in New York, greed and unreasonableness would be factors that the Commission would weigh in making the decision and sophistication of the claimants, prudence, etc. We have sometimes had high rates of returns promised but never anything this outrageous. This sounds more like an illegal ponzi scheme in which the claimants were willing to participate. I can't say for sure but I think under these circumstances the California fund would probably deny. Depending on the particular facts there are many factors to consider in loan/investment cases here, but the Commission does have a rule where the fund may deny if the lawyer and applicant participated in any illegal or tortious conduct; if illegality is not clear, the Commission may also deny if the applicant failed to act reasonably considering the circumstances of the transaction.

----- Original Message -----

From: <Tonimoss@aol.com>
Sent: Thursday, July 25, 2002 3:26 AM
Subject: Re: Fw: FW: Fw: Investment Scheme Inquiry

in maryland we do not honor investment schemes unless there is an attorney client relationship. we also determine whether or not the attorney came into possession of the money as a direct result of the attorney client relationship. also considered is the educational and business background of the investor, whether the attorney initiated the transaction, and whether the attorney provided the claimant with a financial disclosure and the right to independent counsel. if we do honor the claim we do not pay, under any circumstances, interest or profit. hope this helps.
janet moss.

INVESTMENT CLAIMS

----- Original Message -----

From: "Holtaway, John" <JHoltaway@staff.abanet.org>
Sent: Friday, March 07, 2003 2:34 PM
Subject: CSF Investment Claims-Inquiry From Oregon

Colleagues:

Our fund is struggling with several investment claims and we are looking for guidance from any of you that have experience with this. The lawyer solicited a number of his clients to invest in some kind of computer/internet development project that was going to make everyone rich. Unfortunately it turned out not to be so. The clients are now asking the Fund to reimburse them on the theory that "but for" the lawyer-client relationship and their trust in the lawyer they would never have invested.

The lawyer is adamant that these were investments, not loans, and that he never had the personal benefit of the money, although it is not at all clear what happened. Actually, I think the lawyer was soliciting investments for his pal who was supposed to be the brains of the outfit and who has

(conveniently) disappeared. There is not much evidence to support a conclusion that the lawyer stole the clients' money. The difficult issue is whether it is enough that they wouldn't have invested but for their trust in him (so they say) or at the very least that he was using his relationship with the clients to troll for investors in a scheme that he thought would enrich himself as well.

I would be interested in any experience or ideas you have to help my group decide these claims. Thanks.

Sylvia E. Stevens
Oregon State Bar
Assistant General Counsel

----- Original Message -----
From: "Root Edmonson" <REdmonson@NCBAR.com>
Sent: Friday, March 07, 2003 3:26 PM
Subject: Re: CSF Investment Claims-Inquiry From Oregon

NC's rule relating to investment claims states that the following will not be deemed a reimbursable loss:

(E) losses arising in investment transactions in which there was neither a contemporaneous attorney-client relationship between the attorney and the applicant nor a contemporaneous fiduciary relationship between the attorney and the applicant customary to the practice of law. By way of illustration but not limitation, for purposes of this rule (Rule 1401(b)(8)(E)), an attorney authorized or permitted by a person or entity other than the applicant as escrow or similar agent to hold funds deposited by the applicant for investment purposes shall not be deemed to have a fiduciary relationship with the applicant customary to the practice of law.

Just having an attorney-client relationship doesn't show dishonest conduct. If the lawyer invests money he has received for the client (such as from a personal injury settlement), it is easier to overcome the presumption that the claim will be dismissed due to it being an "investment" claim. The source of the funds came as a direct result of the attorney/client relationship. However, if the investor happens to be a client of the lawyer, but the lawyer isn't handling anything relating to the funds used for the investment, it is harder to overcome the presumption that the claim is not a reimbursable loss. Other issues important to the inquiry are things such as the lawyer's personal involvement in the investment, or possibility of personal gain (from a commission for instance) and the amount of disclosure of the risks of the investment (and the client's willingness to assume that risk.) If the only link to the lawyer was that the money was sent by the lawyer to another entity, and then lost by that entity, it becomes very difficult to prove that the loss was caused by the lawyer's dishonest conduct.

This concludes my Friday afternoon rambling.

-----Original Message-----
From: Kenneth.Bossong@judiciary.state.nj.us
Sent: Friday, March 07, 2003 3:34 PM
Subject: Re: CSF Investment Claims-Inquiry From Oregon

Sylvia,
You present the classic investment - type claim. First and most important suggestion: separate the attorney/client relationship and dishonest conduct issues and take them one-at-a-time. Otherwise you'll never get a grip on either one. (Each has an article in 2 out of the last three Webbs, I believe.)
A/C Relationship: You call the claimants "clients". If they were at some time clients, use the nuances of the But For Test's analytical framework to consider the details of the various relationships. Who

approached whom? How did lawyer know they had money to invest? What was relative sophistication? Was normal prudence overcome? Etc. Every fact can make a difference. (Just me, but I'm skeptical of the notion that lawyer was no longer "their" lawyer and trusted as such, unless reason to believe so.)

Dishonest conduct: This may be the bigger hurdle. If lawyer is "adamant", put him to his proofs. What exactly did he promise to do with their money, and what exactly did he do with it? Once claimant makes prima facie showing of money going to lawyer, burden falls to lawyer (me, again) to prove proper disbursement. If to pal, need facts on pal and his purported project. "It turned out not to be so" means (a) there was no pal; (b) there was a pal, but no project; or (c) there was a project; alas, it failed?

When you get these facts, let's kick this around some more.

Best regards,
Ken
Kenneth.Bossong@judiciary.state.nj.us

INVESTMENT LOANS

----- Original Message -----

From: "Holtaway, John" <JHoltaway@staff.abanet.org>
Sent: Friday, May 09, 2003 11:51 AM
Subject: Another "but for" question?

Our fund has claims from four clients who loaned money to their lawyer who (surprise!) didn't pay it back. Originally, the lawyer approached the clients (some current, some former) about investing in a project in which he was a partner. They all declined, some because they considered it a "fly-by-night" proposition. However, they all agreed to loan the lawyer money (\$5,000 to \$65,000) at 15% interest, knowing that he would invest it in the project and repay the loans out of profits from the project.

The US Attorney has been investigating the lawyer and concludes that the lawyer was duped by his partner, that the lawyer didn't understand the nature of the scheme or the risk, or (in the words of the US Attorney) that the whole thing was a scam. In other words, our lawyer seems to have genuinely believed that his partner was going to make them all rich and that all the loans would be repaid with interest and the lawyer would be taking money to the bank in wheelbarrows.

It is also clear to the US Attorney that the only reason people made the loans to the lawyer was because he was their lawyer and they trusted him. The lawyer did not advise them of the risks of the loans, largely because he didn't see any particular risk. However, the US Attorney also believes that the lawyer will eventually come to grips with the fact (and so testify) that he was wrong in taking money from trusting clients and investing it in something he didn't fully understand without at least explaining the risk.

What would other funds do with these claims??? We are split....

Sylvia E. Stevens
Oregon State Bar
Assistant General Counsel

----- Original Message -----

From: "Robert Minto" <rminto@alpsnet.com>
Sent: Friday, May 09, 2003 1:09 PM
Subject: RE: Another "but for" question?

This would likely be denied under the Montana Rules. My conclusion is based on prior fund claims in which loans were not repaid. We determined that when the funds transferred from the client to lawyer under the terms of a note (loan agreement written or verbal) the funds ceased to be funds of the client and therefore there could not longer be a wrongful taking. While the attorney client relationship may have been a factor in the clients decision to make the loan it doesn't rise to the level of a taking under our rules.

Robert W. Minto, Jr.

----- Original Message -----

From: "Michael D. Miyahira" <miyahira@gte.net>
Sent: Friday, May 09, 2003 2:15 PM
Subject: RE: Another "but for" question?

The Hawaii Fund would probably deny the claim as it doesn't appear to meet one of our criteria; that the claim arise from an attorney-client relationship. Instead, we would probably view this as a business relationship between the lenders and the borrower. The lenders' recourse should be against

the borrower as in a normal business relationship.

Michael D. Miyahira

----- Original Message -----

From: "William Ricker" <WRicker@Akerman.com

Sent: Monday, May 12, 2003 8:56 AM

Subject: Re: Fw: Another "but for" question?

I am quite sure Florida would not approve his claim. It clearly was an investment and the lawyer did not originally have the money in his possession "but for" the attorney client relationship. He solicited the money. This is not an attorney-client activity related to the normal practice of law.

----- Original Message -----

From: Kenneth.Bossong@judiciary.state.nj.us

Sent: Monday, May 12, 2003 4:22 PM

Subject: Re: Another "but for" question?

To answer the question in the subject: I don't think so. The primary difficulty here is the finding of "dishonest conduct". The "but for" test helps with the issue of Attorney-Client Relationship. With current clients, you don't even need the "but for" test to find the requisite relationship. As to the former clients, applying the test's analysis to the facts (see Client Protection Webb, Vol. 5, No. 1, p6) I think you'll find it there as well, with little difficulty. The lawyer approached them, undoubtedly utilizing knowledge gained in the prior representation and trading on trust gained as their lawyer.

No, the tougher problem is the finding of compensable dishonest conduct (see Webb, Vol. 5, No. 3, p2). Taking the facts as presented at face value, the thief, or scam artist, was not the lawyer, but the other guy. The lawyer did not steal clients' money; he borrowed it, invested it as he said he would (but poorly as it turns out), and still owes it to the clients. The facts say the lawyer himself was scammed by his partner. If the facts bear out, we reject this claim.

I do say if, because I would put this lawyer to his proofs on them. I'd want every available fact on the partner, the purported project, and where the money actually went. I'm always curious on these whether lawyer proves he put any of his own personal money into it.

Finally, there is one fact here that I find unusual and peculiar. The clients turned lawyer down flat on the investment request, fearing the venture to be "fly-by-night", yet readily lent him money to invest in the same thing? Why? If they didn't want a piece of the project as investors, with perhaps personal guarantees from lawyer, how did he talk them into the loans? They wanted 15%, rather than their portion of the potential profits?

In the absence of further negative facts, lawyer did not lie or even intentionally misrepresent, much less steal.

Ken Bossong

----- Original Message -----

From: MillerFG@aol.com

Sent: Monday, May 12, 2003 4:44 PM

Subject: Re: Fw: Another "but for" question?

Honest lawyers don't borrow money from their clients.

----- Original Message -----

From: Robert Minto
Sent: Monday, May 12, 2003 5:25 PM
Subject: RE: Fw: Another "but for" question?

Dear Fred:

Short answers are not always the best. Your statement is probably true, but it begs the issue of fund liability for bad loan decisions by clients with questionable business judgment. What is your answer; should the fund pay off?

Bob --

----- Original Message -----
From: MillerFG@aol.com
Sent: Tuesday, May 13, 2003 9:13 AM
Subject: Re: Fw: Fw: Another "but for" question?

Dear Bob: How can law clients who have questionable business judgement be protected from making bad loan decisions with their lawyers? It would sure help if they are provided with independent counsel, as required by the Model Rules. If that ring of protection fails, then the client protection fund should step up to the plate. What possible defense does a loan-seeking lawyer have to his/her failure to provide independent counsel? "Oh, I fogot about it?" "Didn't have the time"? -- As I said, honest lawyers don't borrow money from their clients, without protecting them from loss. -- Fred Miller

----- Original Message -----
From: tos@nylawfund.org
Sent: Tuesday, May 13, 2003 9:13 AM
Subject: Re: Fw: Fw: Another "but for" question?

In New York, we would apply the same analysis Ken discussed. The first issue is whether the loss arose out of an attorney-client relationship. The few facts we have indicate that these loans did arise out of an attorney-client relationship. Factors we consider are that the lawyer was privy to the clients' finances due to the attorney-client relationship, the proximity of the legal services and the loan transaction, the educational background and disparity in bargaining power, and whether the lawyer allowed for independent counsel.

The more serious obstacle to an award here though appears to be the requirement of dishonest conduct. I don't see where there has been a misappropriation or wilful misapplication by the lawyer. We would look closely to try and find dishonesty but it appears that the lawyer was duped and that the dishonest party was the business partner. If that is the case, we would likely deny.

Tim O'Sullivan
NY Fund

----- Original Message -----
From: "Gonzales, Martha" <Martha.Gonzales@calbar.ca.gov>
Sent: Tuesday, May 13, 2003 11:27 AM
Subject: RE: Another "but for" question?

I replied earlier but would like to add a comment to Tim's remark that the key here is whether or not the attorney was "duped." In CA I remember a situation just like this one where the criminal matter cleared the atty and in another case the State Bar Court did not find culpability. However, we looked further and waited a while for the evidence to float to the top and sure enough we found that the R

was not as innocent as he had originally appeared. The atty duped the disciplinary agency and the DA.

----- Original Message -----

From: Robert Minto
Sent: Tuesday, May 13, 2003 12:10 PM
Subject: RE: Fw: Fw: Another "but for" question?

Dear Fred:

All of what you say rings true to this core of "True Believers" including me, but most fund rules are not driven by the Model Rules, but rather by internal definitions such as "dishonest conduct, "wrongful taking", "Theft", etc. Also remember again most Fund rules require multiple criteria; a taking, a relationship and disbarment or adverse civil or criminal judgment. Loans that are not repaid, irrespective of the existence of, dependence on or whether the transaction "arises out of an attorney client relationship" do not meet that criteria unless actionable fraud can be proven, disbarment conviction or judgment exists. Unfortunately for clients like this, they won't get there on these facts. We must remember that if we push to far in this direction the leap to paying simple malpractice claims come with in reach.

Bob --

----- Original Message -----

From: Bob Welden
Sent: Tuesday, May 13, 2003 1:44 PM
Subject: RE: Fw: Fw: Another "but for" question?

There are some of us, of course, who think that bars should consider ways to pay "simple malpractice *claims" when our lawyers don't meet their responsibility to their clients, including being financially responsible. This will be a topic of discussion at the National Forum this month, so y'all come now.

Bob Welden
General Counsel
Washington State Bar Association

---- Original Message -----

From: Karen O'Toole
Sent: Wednesday, May 14, 2003 10:02 AM
Subject: Re: Fw: Fw: Another "but for" question?

This is my strong suspicion too. I do not see the lawyer as being the innocent that Ken and Tim do. May be I have been doing this too long?.

MALPRACTICE

----- Original Message -----

From: Lynda Shely
Sent: Thursday, January 16, 2003 9:03 AM
Subject: 3 malpractice questions

Folks, I really need your help on the following three preliminary questions (we may ask for more information later!) regarding malpractice claims in your state:

1. APPROXIMATELY what percentage of your annual denied claims would you say allege malpractice/negligence by a lawyer?
2. Is malpractice/negligence one of the most common reasons for denial of a claim? Please just give me an idea of the frequency.
3. What is your approximate percentage of private practice lawyers who lack malpractice insurance in your state (ok, Sylvia, you don't have to respond - I know it's 0!)? If you have any documentation on this statistic, could you PLEASE send this to me?

Thank you all for your assistance on this. As you can guess, I'm trying to determine whether we Fund folks really do see a lot of claims that allege malpractice for which we can't help the victims (and the lawyers' lacked coverage).

Lynda C. Shely
Director of Lawyer Ethics
State Bar of Arizona

----- Original Message -----
From: John S. Gleason
Sent: Thursday, January 16, 2003 10:09 AM
Subject: Re: 3 malpractice questions

Lynda: In Colorado we estimate that approx. 40% of the attorneys are uninsured. We just mailed to every attorney (in the annual registration packet) a questionnaire regarding malpractice insurance. My office, the supreme court advisory committee, and the court are considering mandatory insurance or disclosure to the client of the absence of insurance. Our Fund is too new to have a well developed sense of what percentage of denials are based on malpractice issues.

----- Original Message -----
From: "William Ricker" <WRicker@Akerman.com>
Sent: Wednesday, January 22, 2003 12:08 PM
Subject: Re: 3 malpractice questions

Lynda: surveys indicate that about 45% of FL lawyers go bare-- I mean no insurance, of course. We think that less than 10% of our claims are denied because they are negligence, but we do not keep records on that.

----- Original Message -----
Sent: Thursday, January 16, 2003 10:09 AM
Subject: Re: 3 malpractice questions

Lynda - -

- 1) In 2002, 4 out of 9 denied.
- 2) In 2002, malpractice/negligence was our second most common reason for denial - - our most common reason was that the bank reimbursed.
- 3) Unknown, but have heard most do not have insurance.

Carole Richelieu
Hawaii Fund Administrator

---- Original Message ----

Malpractice Not Recoverable in ID

I think that this is an important issue for all of us concerned about client protection and we need to continue a dialogue on it. As you all know, other than Oregon, no US jurisdiction requires lawyers to have professional liability insurance. From my experience, most clients are unaware of this until after their lawyer commits malpractice and they ask who his or her insurer is. In Washington, most professional licenses (as well as drivers' licenses) require that the licensee maintain some level of insurance or other financial responsibility. Not lawyers.

For most states, the issue of mandatory malpractice insurance has either been rejected or is so volatile that the jurisdiction won't even address it. The Standing Committee on Client Protection could not even get any other ABA entity to support a proposal for a model rule providing for mandatory disclosure to clients of whether or not a lawyer is insured, although some states have done this on their own.

It amazes me that some responsible people for whom I have the utmost respect think that the status quo is acceptable. It isn't.

Clearly, our existing client protection funds don't have the resources to try to compensate for malpractice, even if they were inclined to do so. But I urge continued thought about ways to address this problem. Thanks.

Bob Welden
General Counsel
Washington State Bar Association

MALPRACTICE II

----- Original Message -----

From: Marbley Green Janet

Sent: Tuesday, April 16, 2002 3:08 PM

Subject: Please post this inquiry to ListServ

The Clients' Security Fund of Ohio received 19 claims alleging losses resulting from an attorney's misappropriation of funds placed on deposit with several banks. The Claimants, who were New York residents, hired an Ohio attorney and authorized him to open accounts at several Ohio banks on their behalf. The attorney was the only authorized signer on the accounts. The claimants were all members of the same family. Some accounts were opened on behalf of minors, but accounts were also opened on behalf of three limited partnerships, a publicly-held corporation and two of its wholly-owned subsidiaries. The CSF verified the attorney's misappropriation of the funds. A portion of the losses sustained by the Corp. and its subsidiaries were covered by insurance, but each entity requested that the CSF reimburse the remaining loss.

The claims filed on behalf of the minors were determined to be eligible for reimbursement. The Claims filed by the partnerships and corporations were determined to be ineligible. Ohio's rule does not prohibit reimbursement of losses to corporate entities, but a majority of the CSF Board of Commissioners, in the exercise of their discretion, voted to deny these claims. The partnership/corporate claimants have requested reconsideration, arguing that a theft from an entity ought not be treated any differently than a theft from an individual and that the claims are identical in nature to the claims by the individuals.

Would your fund pay the claims filed by the partnerships and corporations? Why or why not?

Thanks for your time in responding.

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

----- Original Message -----

From: Victoria Rees

Sent: Wednesday, April 17, 2002 9:46 AM

Subject: RE: Please post this inquiry to ListServ

I doubt NS would pay because these corps/partnerships would not meet the criterion of being 'in need of assistance'. While our Fund is one of first resort, we all recognize that it has limitations and should cover reimbursement of those most in need. As well, corporations and partnerships have other remedies and resources available to them that individuals do not. I think your Fund's decisions on all fronts was perfectly appropriate.

Good luck!

----- Original Message -----

From: Cole, Marty

Sent: Wednesday, April 17, 2002 11:19 AM

Subject: RE: Please post this inquiry to ListServ

Minnesota would pay, and has paid on several occasions, valid claims brought by corporations or other business entities, even some large multi-national corporations. Although our board has plenty of discretion, I can't imagine them turning down a genuine innocent victim of a lawyer's dishonesty solely based upon any group characteristic (such as type of entity or a family relationship to the

respondent - our rules are silent on this) as long as the Fund is healthy enough to handle it. As to the reasoning, I believe they would see it as an issue of basic fairness and fulfilling their purpose to compensate the victims of lawyer dishonest conduct.

----- Original Message -----

From: Michael D. Miyahira
Sent: Wednesday, April 17, 2002 11:55 AM
Subject: RE: Please post this inquiry to ListServ

I believe the Hawaii Lawyers' Fund would pay the claim regardless of the claimant being a corporation, partnership or individual. What is at issue is whether the respondent attorney did commit a dishonest act. Since that determination has been made, and barring any other mitigating issues or concerns, we would reimburse on the basis of the facts as presented.

Michael D. Miyahira

----- Original Message -----

From: Dan H.
Sent: Wednesday, April 17, 2002 12:00 PM
Subject: Re: Fw: Please post this inquiry to ListServ

I would want more facts. Why did they give the lawyer the money? What was the purpose of the Ohio Accounts? What was the Ohio connection? Why do I have visions of Vito Corleone sending his slow son Freddy to Las Vegas to start a new family business? Sorry, I strayed.

Can they (all family members) collectively be viewed as one entity and, if so, does the aggregate of their claims exceed the per-claimant maximum? If the answers are yes and no, respectively, then treat all claims as one and pay out the maximum.

Assuming every claim is an individual claim, and your Fund does allow claims by partnerships then, you're right, it should treat all individual and partnership claimants the same. The reason that I think partners should be treated like individual clients is because they suffer the same individual proportionate risks when a loss is suffered.

The corporations, as a public company, can and should be categorized differently. Public Corporations, unless shams, should have sufficient insurance, indemnity bonds, and write-offs in place to effectively absorb the loss. If there weren't, then one could sue the officers or insurance agent for not minding the store and keeping sufficient insurance in place, in which place the officers' malpractice coverage will kick-in. If the amount that they seek from your Fund is their insurance deductible, then that was a business decision they made long ago --- to take the hit for the amount of the deductible.

Getting back to the Officers' negligence, the Corporate officers may be liable for allowing an outsider to handle and have signatory power over their money. You say that the lawyer was an authorized signatory, but what obligation did he have to comply with general accounting practices and corporation auditing to maintain the integrity of their money for the stockholders? The SEC may want to know about this transaction/loss, then you'll see how fast the claim is withdrawn.

Dan Hendi, NJ

----- Original Message -----

From: "Kenneth Bossong" <Kenneth_Bossong@judiciary.state.nj.us>
Sent: Wednesday, April 17, 2002 12:18 PM
Subject: Fw: Please post this inquiry to ListServ -Reply

Needless to say, I'd have lots of questions. But assuming compensability and all other things being equal, NJ would pay entities the same as individuals.

Ken Bossong

----- Original Message -----

From: Mary Ann Cummings
Sent: Thursday, April 18, 2002 4:33 PM
Subject: RE: Please post this inquiry to ListServ

British Columbia's special fund has paid partnerships and corporations in the past, but the corporations are generally small businesses. Generally where the lawyer has stolen the funds and the claimant has suffered a loss the Committee authorizes payment from the Fund. They do not base a payment on whether the claimant is suffering hardship. On the other hand, we have not had a claim from a large public company or financial institution. The Committee has complete discretion, and would examine the circumstances very carefully, with many questions about insurance, indemnity bonds, etc.

Mary Ann Cummings
Law Society of B.C.

----- Original Message -----

From: <Tonimoss@aol.com>
Sent: Monday, April 22, 2002 11:13 AM
Subject: Re: Fw: Please post this inquiry to ListServ

Janet, I would say that Maryland would pay some and may not pay the corporation claims. We now have a regulation where the corporation may not have more than ten employees. Then I would have to question why the attorney had the only signatory on the account. I would also question the corporation's liability to allow the attorney to set the accounts up this way. We would also question whether or not this was an investment scheme or not. Hope this helps. Janet Moss, Maryland Clients' Security Trust Fund soon to be known as the Client Protection Fund of the Bar of Maryland.

----- Original Message -----

From: "Dave McKillop" <DMckillo@lsuc.on.ca>
Sent: Thursday, April 25, 2002 8:34 AM
Subject: Re: Fw: Please post this inquiry to ListServ

Janet:

Ontario has no rule that would prevent payment to the corporations and limited partnerships [we do have a rule that prevents payment to banks and other financial institutions engaged in the business of lending money]. Our Committee does, however, use its discretion when considering payments to corporations of significant means. A few years back the Committee used its discretion to reject a claim from Canada's largest oil company. It has however approved all kinds of payments to smaller corporations. I suspect our Fund would approve the claims to the partnerships and corporations.

David McKillop
Assistant Secretary
Law Society of Upper Canada

----- Original Message -----

From: Donahue, Eileen
Sent: Thursday, April 25, 2002 2:54 PM
Subject: RE: Please post this inquiry to ListServ

Janet; Sorry for the delay in responding to your inquiry. I just read David McKillop's response and I think our response would be very similar. We have no formal rule or policy against business entities and we have paid many. We do look at them a little more closely regarding whether they pursued other remedies. We might not pay a huge corporation, but it would be an exercise of discretion and not pursuant to any rule. Hope this helps, Eileen.

MANAGING PARTNER LIABILITY

From: "Carol Burg" <cburg@state.de.us>
Sent: Thursday, December 19, 2002 7:15 AM
Subject: Managing Partner

What are the managing partner's responsibilities to see that the firm complies with the accounting rules?

PREPAID FEES

-----Original Message-----

From: Kenneth.Bossong@JUDICIARY.STATE.NJ.US
Sent: Thursday, April 24, 2003 5:40 PM
Subject: Prepaid Fees and Expenses

I would appreciate responses from as many jurisdictions as possible:

(1) Does your jurisdiction require fees and costs paid to a lawyer in advance to be deposited in the lawyer's trust account and drawn against only as earned (and expended, in the case of costs)?

(2) If so, where - in an RPC, DR, Court Rules of practice, case law, elsewhere?

(3) If not, is your jurisdiction considering it in light of the recommendation in Ethics 2000 that it become RPC 1.15(c)?

Thank you, all.

Ken Bossong
Kenneth.Bossong@judiciary.state.nj.us

----- Original Message -----

From: "Marbley Green Janet" <MarbleyJ@sconet.state.oh.us>
Sent: Monday, April 28, 2003 12:06 PM
Subject: Re: Prepaid Fees and Expenses

DR 9-102 in Ohio's Code of Professional Responsibility does not require costs and expenses (as opposed to legal fees) advanced to a lawyer to be deposited in a lawyer's trust account.

The Supreme Court of Ohio recently appointed a commission to review Ethics 2000 and make recommendations.

Janet Green Marbley

----- Original Message -----

From: "Office of Disciplinary Counsel--Hawaii" <odc@lava.net>
Sent: Monday, April 28, 2003 4:48 PM
Subject: Re: Prepaid Fees and Expenses

(1) yes.

(2) our HRPC 1.15 is very detailed - better than Model Rules 1.15

http://www.courts.state.hi.us/page_server/LegalReferences/271A7DD039E757A8EAE7AD4B72.html

Carole R. Richelieu
Fund Administrator
Lawyers' Fund for Client Protection
of the Bar of Hawaii

CALCULATING ELIGIBLE FEES

----- Original Message -----

From: "Marbley, Janet" <MarbleyJ@sconet.state.oh.us>
Sent: Friday, November 30, 2001 9:20 AM
Subject: Questions for List Serv

I would like to know how your funds would decide these two situations:

1. Under Ohio law, the probate court must approve the distribution of settlement proceeds in wrongful death cases and must approve attorney fees. Court rules also limit attorney fees in such cases to 1/3 of the settlement amount. The CSF has received 3 claims in which the attorney received a fee of 50% of the settlement amount in wrongful death cases and distributed the settlement proceeds without first obtaining court approval. The claimants signed a written fee agreement agreeing to the 50% fee. The attorney, however, knew what the rules provided, and has been convicted of stealing over \$1million from his former clients.

Would your fund deny reimbursement in these claims?

2. In claims where the attorney has stolen settlement proceeds, does your fund award the claimant the total amount stolen, or does your fund deduct attorney fees, i.e. 1/3, and award the claimant the balance?

Your input is appreciated.

Janet Green Marbley
Clients' Security Fund of Ohio

---- Original Message -----

From: "O'Sullivan, Tim" <TOS@nylawfund.org>
Sent: Friday, November 30, 2001 9:30 AM
Subject: Questions for List Serv

Janet - In New York, we would pay the difference between the 1/3 and 50% fee as the fee arrangement was dishonest "per se" under court rules; we would also rely upon the the fact that we have a known thief and (we infer) an unsophisticated client who was taken advantage of.

Regarding the settlement; if the settlement was effected with the knowledge and consent of the client, we would deduct the fee portion; however, if the settlement was made without the client's consent, we would reimburse the full settlement amount.

- Tim O'Sullivan

PRO HAC VICE LOSSES/CLAIMS

-----Original Message-----

From: NCPO [mailto:ncpo@mybizz.net]
Sent: Friday, January 31, 2003 2:36 PM
Subject: Question re Pro Hac Vice Lawyers

Question re Pro Hac Vice Lawyers:

It would be helpful if I could find out if any Fund has ever had any client losses caused by a lawyer admitted pro hac vice to that state. If any Fund has experienced these losses, does your jurisdiction

require pro hac vice lawyers to pay the registration fee required of your state's lawyers. Also, did your Fund consider these losses to be eligible?

Thank you.
Tim O'Sullivan
NY Lawyers' Fund

----- Original Message -----
From: Donahue, Eileen
Sent: Friday, January 31, 2003 12:53 PM
Subject: RE: Question re Pro Hac Vice Lawyers

Tim; Illinois has never had a claim involving a lawyer admitted pro hac vice, and we have no policy to cover such an eventuality. Illinois does not charge a registration fee, or any fee at all, for pro hac vice admission.

Eileen

----- Original Message -----
From: Christopher Blanchard
Sent: Friday, January 31, 2003 1:30 PM
Subject: RE: Question re Pro Hac Vice Lawyers

Tim- in Connecticut, we have not had any losses claimed that involve attorneys admitted pro hac vice, so we have not had to address the issue. With respect to our annual client security fund fee assessed against lawyers, we do not collect the fee from attorneys admitted pro hac vice. However, on occasion, a judge who has before him or her a petition for admission pro hac vice has made payment of the fee a condition of admission.

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

----- Original Message -----
From: Kenneth.Bossong@judiciary.state.nj.us
Sent: Friday, January 31, 2003 2:21 PM
Subject: Re: Question re Pro Hac Vice Lawyers

NJ does require pro hac vice admitees to pay the same annual assessment licensed NJ lawyers pay for as long as they appear in a NJ matter - only one payment per calendar year, regardless of how many matters. We've not yet had a claim against a PHV lawyer.

Ken
Kenneth.Bossong@judiciary.state.nj.us

----- Original Message -----
From: MillerFG@aol.com
Sent: Friday, January 31, 2003 2:38 PM
Subject: Re: Fw: Question re Pro Hac Vice Lawyers

Tim's question will become increasingly important to client protection funds with the advent of state MJP rules authorizing non-admitted attorneys to practice law in the host state.

----- Original Message -----

From: Kenneth.Bossong@judiciary.state.nj.us
Sent: Friday, January 31, 2003 2:32 PM
Subject: Re: Fw: Question re Pro Hac Vice Lawyers

Following up on Chris Blanchard's reply: that's how we got started in NJ, some years ago. First one judge, and then others, thought it only appropriate to have those they admitted PHV pay like anyone else practicing before them. At some point (February of 1984) it became a Rule of the Supreme Court. In case my prior post was not clear, we would have jurisdiction over claims against PHVs.

Ken
Kenneth.Bossong@judiciary.state.nj.us

----- Original Message -----

From: Root Edmonson
Sent: Friday, January 31, 2003 3:04 PM
Subject: RE: Question re Pro Hac Vice Lawyers

In NC, the Client Security Fund was established by the NC Supreme Court to reimburse "clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina..." Presumably, out of state lawyers admitted pro hac fit this definition. However, we have never had a claim against a pro hac attorney requiring the Board to interpret the rule. In NC, no fee is charged to an out of state lawyer to be admitted pro hac. I think that the current Board would not be inclined to reimburse a victim of a lawyer who had not even paid an assessment to the Fund. An important consideration would be whether the victim could pursue a claim against the lawyer in the lawyer's home state.

----- Original Message -----

From: "Kris Wenzel" <kwenzel@wisbar.org>
Sent: Friday, January 31, 2003 2:36 PM
Subject: Re: FW: Question re Pro Hac Vice Lawyers

Wisconsin has not had this occur, to date

----- Original Message -----

From: Marbley Green Janet
Sent: Friday, January 31, 2003 3:35 PM
Subject: RE: Question re Pro Hac Vice Lawyers

Tim, Ohio's CSF has never considered losses caused by an attorney admitted pro hac vice. Pro hac vice lawyers do not pay attorney registration fees paid by licensed Ohio attorneys.

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

----- Original Message -----

From: John S. Gleason
Sent: Saturday, February 01, 2003 10:08 AM
Subject: Re: Fw: Question re Pro Hac Vice Lawyers

This is a topic I am covering at the meeting...

----- Original Message -----

From: Lewis-Koch, Beverly
Sent: Monday, February 03, 2003 10:13 AM

Subject: RE: Question re Pro Hac Vice Lawyers

Not in D. C. The attorney has to be a member of the D.C. Bar. The pro hac vice attorney dishonest conduct should be addressed by the State Fund where he/she is licensed.

----- Original Message -----

From: Gonzales, Martha
Sent: Monday, February 03, 2003 12:57 PM
Subject: RE: Question re Pro Hac Vice Lawyers

I don't recall a claim against a pro hac vice lawyer. Our fund will only reimburse if the lawyer is admitted to practice in Calif. Pro Hac Vice lawyers do not pay any fees to this fund.

----- Original Message -----

From: "Bob Welden" <bobw@wsba.org>
Sent: Monday, February 03, 2003 1:31 PM
Subject: Re: Question re Pro Hac Vice Lawyers

Washington has never had an application to the Fund for a pro hac lawyer.

We have a proposed admissions rule amendment pending before the Supreme Court to formalize the pro hac admission procedure, including payment of a registration fee. The proposal includes that the pro hac lawyer would pay the LFCP assessment as well. However, there is little support for including the fund assessment because we have never had a pro hac claim.

Bob Welden
General Counsel
Washington State Bar Association

----- Original Message -----

From: "William Ricker" <WRicker@Akerman.com>
Sent: Monday, February 03, 2003 3:38 PM
Subject: Re: Fw: Question re Pro Hac Vice Lawyers

Florida has not faced the issue, the I can remember, but I believe the claim would be denied since our rule says we only reimburse loss by a member of the Florida Bar.

----- Original Message -----

From: Kenneth.Bossong@judiciary.state.nj.us
Sent: Monday, February 03, 2003 8:04 PM
Subject: Re: Fw: Fw: Question re Pro Hac Vice Lawyers

I would respectfully recommend all jurisdictions to consider pursuing this two-pronged policy:
(1) Everyone admitted pro hac vice be required to pay into the Client Protection Fund - more specifically, that such admissions be conditioned upon payment for as long as appearance in any matter continues; and

(2) The Fund explicitly take jurisdiction over claims against lawyers admitted pro hac vice, and treat such claims as any other.

While not solving all MJP problems, obviously, this would be an excellent convention to adopt. If every jurisdiction did so, it would close a potential hole in the safety net afforded the public. At the same time, additional revenues commensurate with the risk would be available to the Funds. Consider:

a) For a host of reasons, I think it inevitable that some Funds will balk at covering the behavior of "their" lawyers elsewhere. "We have no control of them traipsing all over", "How can we ask our lawyers to pay when neither the client nor the transaction had anything to do with here?" and so forth. Also, if licensed in more than one, which "home" state's Fund gets to pay? If such Funds are willing to pay or contribute, that is laudable (and even useful where a large claim exceeds one Fund's limits), but we should not rely upon it.

b) Under the proposal, each Fund gets to ensure its citizens of protection.

c) It is appropriate and beneficial to affirm the connection between a judicial system's admission of a lawyer and that system's taking of responsibility for the consequences.

d) Loss is borne in the only place it had any chance of being prevented. This is not only just; it spurs implementation and innovation of loss-prevention mechanisms.

e) Just a guess, but I would expect revenues into the Fund to exceed claim payments, over time. If most are admitted pro hac because of either special expertise or special relationship with the client, or both, their pool may present a bit less exposure.

Funds that do not enjoy the benefit of an assessment will not, of course, have an assessment to plug pro hac admitees into. All of the above is less important to them, anyway, than securing a source of steady, sure, and adequate funding.

Ken Bossong
Kenneth.Bossong@judiciary.state.nj.us

----- Original Message -----

From: "William Ricker" <Wricke@Akerman.com>
Sent: Tuesday, February 04, 2003 9:57 AM
Subject: Re: Fw: Fw: Fw: Question re Pro Hac Vice Lawyers

Ken: it seems like this should be part of the model rule, or an appropriate model rule of its own. For instance Rule 3 refers to funding from lawyers admitted and licensed in the jurisdiction. It would be easy to add a subsection to make clear that pro hac vice lawyers must pay in also(although that may go against the idea of admitted and licensed in the jurisdiction. Has the standing committee considered this? Has anyone drafted a model rule?

----- Original Message -----

From: Holtaway, John
Sent: Tuesday, February 04, 2003 10:39 AM
Subject: RE: Fw: Fw: Fw: Question re Pro Hac Vice Lawyers

Bill:

Here is the text of Rule 1 of the ABA Model Rules for Lawyers' Funds for Client Protection. Rule 1 was amended on August 13, 2002 by the ABA House of Delegates to include pro hac vice lawyers.

RULE 1 PURPOSE AND SCOPE

A. The purpose of the Lawyer's Fund for Client Protection is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in the courts of this jurisdiction occurring in the course of the client-lawyer or other fiduciary relationship between the lawyer and the claimant.

B. For purposes of these Rules, "lawyers admitted and licensed to practice law" shall include lawyers admitted pro hac vice and lawyers recently suspended or disbarred whom clients reasonably believed to be licensed to practice when the dishonest conduct occurred.

C. Every lawyer has an obligation to the public to participate in the collective effort of the bar to reimburse persons who have lost money or property as a result of the dishonest conduct of another lawyer. Contribution to the Lawyers' Fund for Client Protection is an acceptable method of meeting this obligation.

Comment

Paragraph A expresses the general purpose of a Lawyer's Fund for Client Protection: promoting public confidence in the administration of justice and the integrity of the legal profession. The term "dishonest conduct" is defined in Rule 10.

Paragraph B, extends the Fund's protection to instances of theft committed by lawyers in the jurisdiction only by virtue of pro hac vice admission, and by former or suspended lawyers reasonably believed by clients to have been authorized to practice. Lawyers admitted pro hac vice should both pay into the Fund for each year of appearance in a matter under Rule 3 and have their conduct covered by the Fund.

Paragraph C, drawn from the Comment to Rule 1.15 of the Model Rules of Professional Conduct, recognizes that lawyers individually and the bar collectively, have the obligation to participate in a Lawyers' Fund for Client Protection

----- Original Message -----

From: "Bob Welden" <bobw@wsba.org>
Sent: Tuesday, February 04, 2003 11:37 AM
Subject: RE: Fw: Fw: Fw: Question re Pro Hac Vice Lawyers

Perhaps the place to address this is not in the Model Rules for Client Protection, which already address it as John Holtaway points out, but in the Model Rule on Pro Hac Vice Admission adopted by the House of Delegates last year as part of the MJP recommendations. John -- is there something in that rule that I missed that already addresses this?

Bob Welden
General Counsel
Washington State Bar Association

PRO HAC VICE CONTRIBUTION

----- Original Message -----

From: <Tonimoss@aol.com>
Sent: Wednesday, July 03, 2002 8:57 AM
Subject: pro hoc vice

i need to know which funds if any require that an attorney sworn in pro hoc vice must pay into the fund. thanks for your help. thanks janet moss, client protection fund of the bar of maryland....(our new name)

----- Original Message -----

From: Cole, Marty
Sent: Wednesday, July 03, 2002 9:16 AM
Subject: RE: Pro Hoc Vice

Minnesota: No

----- Original Message -----
From: Ray Williams
Sent: Wednesday, July 03, 2002 9:13 AM
Subject: RE: Pro Hoc Vice

The Montana Lawyers' Fund for Client Protection does not receive any sort of assessment from attorneys practicing pro hoc vice, but this is something that is currently under consideration by our LFCP Board. We would be interested in knowing how many jurisdictions require payment from attorneys appearing pro hoc vice as well.

Thanks.
Ray Williams

----- Original Message -----
From: John S. Gleason
Sent: Wednesday, July 03, 2002 9:36 AM
Subject: Re: Pro Hoc Vice

Not in Colorado.

----- Original Message -----
From: Donahue, Eileen
Sent: Wednesday, July 03, 2002 9:39 AM
Subject: RE: Pro Hoc Vice

In Illinois, no pro hac vice payment to the Fund. I do like the idea, though.

-Eileen Donahue

----- Original Message -----
From: Marbley Green Janet
Sent: Wednesday, July 03, 2002 10:02 AM
Subject: RE: Pro Hoc Vice

The Clients' Security Fund of Ohio does not receive fees from pro hac vice admissions.

----- Original Message -----
From: Kenneth.Bossong@judiciary.state.nj.us
Sent: Wednesday, July 03, 2002 9:52 AM
Subject: Re: Pro Hoc Vice

NJ - yes. PHVs pay the same assessment as licensed NJ lawyers for as long as their appearance continues in any matter.

Ken Bossong

----- Original Message -----
From: MillerFG@aol.com
Sent: Wednesday, July 03, 2002 10:17 AM
Subject: Re: Pro Hoc Vice

I may be wrong, but I understand that the taxing authority in New Jersey is using the pro hoc vice

register (of the client protection fund or the court system) to tax out-of-state lawyers for legal fees earned in New Jersey. I am sure Ken will clarify.

-----Original Message-----

From: Gonzales, Martha [SMTP:Martha.Gonzales@calbar.ca.gov]

Sent: Wednesday, July 03, 2002 2:10 PM

Subject: RE: Pro Hoc Vice/Contribution to Fund

No in California. At this time only active members of the California State Bar pay into the fund and our rules only provide coverage for lawyers who are members of the California bar.

PRO HAC VICE FEES

----- Original Message -----

From: ODC

Sent: Tuesday, October 08, 2002 6:16 PM

Subject: fees for pro hac vice attorneys

Aloha!

I apologize in advance if this question has already been asked....Which Funds impose a fee on pro hac vice attorneys? How much is the fee?

Thank you,
Carole R. Richelieu
Fund Administrator

----- Original Message -----

From: Steve Van Goor

Sent: Tuesday, October 08, 2002 6:15 PM

Subject: Re: fees for pro hac vice attorneys

Hi Carole. The Alaska Bar charges \$250.00 per pro hac vice lawyer per case per year. Steve

----- Original Message -----

From: Sylvia Stevens

Sent: Wednesday, October 09, 2002 8:21 AM

Subject: Re: fees for pro hac vice attorneys

Oregon charges a \$250/case/year fee for pro hac vice admission but none of it goes to the Fund. It is all dedicated to low income legal services.

Sylvia E. Stevens
Oregon State Bar
Assistant General Counsel

----- Original Message -----

From: "Karen O'Toole" <k.otoole@massbbo.org

Sent: Wednesday, October 09, 2002 9:25 AM

Subject: RE: fees for pro hac vice attorneys

Massachusetts does not charge any fee for pro hac vice interlopers.

----- Original Message -----

From: Kenneth.Bossong@judiciary.state.nj.us
Sent: Wednesday, October 09, 2002 10:09 AM
Subject: Re: Fw: fees for pro hac vice attorneys

Karen,
Would you pay a claim if they stole?
Ken

----- Original Message -----
From: "Karen O'Toole" <k.otoole@massbbo.org>
Sent: Wednesday, October 09, 2002 11:00 AM
Subject: RE: Fw: fees for pro hac vice attorneys

Possibly not. The Board's jurisdictional rule requires that the atty. was, at the time the claim arose, a member of the Massachusetts bar with an office within the Commonwealth and engaged in active practice. I think that admitted for a limited purpose would be sufficient, but with no office in the Commonwealth would cause a problem. Plus the "engaged in active practice" probably means engaged in active practice in Mass. If you admitted for just one case is that active? What if the case requires numerous appearances in Mass? We have never had a pro hac vice case; one would be interesting to work on.

----- Original Message -----
From: "Ben Cowgill" <BCowgill@kybar.org>
Sent: Wednesday, October 09, 2002 11:30 AM
Subject: Re: fees for pro hac vice attorneys

Kentucky does not presently impose a fee for a pro hac vice appearance, but in fact we are considering such a rule ourselves. I will appreciate being copied on all responses to Carol as I need to provide my Board with a survey of existing practices. Thanks!

Benjamin Cowgill
Chief Counsel to the Kentucky Bar
bcowgill@kybar.org

----- Original Message -----
From: "Kris Wenzel" <kwenzel@wisbar.org>
Sent: Wednesday, October 09, 2002 12:39 PM
Subject: Re: fees for pro hac vice attorneys

Wisconsin, too, does not impose a fee for pro hac vice appearances, however, I keep lobbying the group studying MJP to include language for such a fee.

Kris Wenzel

----- Original Message -----
From: <Tonimoss@aol.com>
Sent: Thursday, October 10, 2002 3:14 AM
Subject: Re: Fw: fees for pro hac vice attorneys

Maryland does not charge for pro hac vice, but we recently sent a case to Pennsylvania where a Maryland attorney stole almost 100,000 in reference to a case she handled only in Pennsylvania. Pennsylvania refused to pay and we ended up paying. I must tell you that this attorney also stole from about 20 other clients in Maryland and we paid on those claims also.

janet moss

----- Original Message -----

From: "Carol Burg" <cburg@state.de.us>
Sent: Thursday, October 10, 2002 6:24 AM
Subject: Re: fees for pro hac vice attorneys

Delaware just increased its pro hac vice fee from \$100 to \$300 per attorney per case effective 1/1/03.

PUBLICIZE NAMES OF LAWYERS

-----Original Message-----

From: Kris Wenzel [SMTP:kwenzel@wisbar.org]
Sent: Monday, July 22, 2002 8:37 AM
Subject: Query for listserv

Wisconsin approved a claim against an attorney whose license to practice law has not been suspended or revoked, nor did the attorney receive a public reprimand from the disciplinary end. How do other jurisdictions handle publicizing the name of an attorney who holds an active license and who has not yet been disciplined in that specific matter? In this case, the client obtained a judgment against the attorney and the attorney agreed the client was owed the money, but the attorney still refused to pay the client.

Thanks,

Kris Wenzel
Administrator
Wisconsin Clients' Security Fund

-----Original Message-----

From: Chris Janku [SMTP:cjanku@mobar.org]
Sent: Monday, July 22, 2002 9:18 AM
Subject: RE: Query for listserve-Wisconsin

We can't pay unless the lawyer is disbarred or suspended. Missouri.

-----Original Message-----

From: Cole, Marty [SMTP:Marty.Cole@courts.state.mn.us]
Sent: Monday, July 22, 2002 9:41 AM
Subject: RE: Query for listserve-Wisconsin

Minnesota has to date only once paid a claim against an attorney who was not either publicly disciplined, dead or transferred to disability status. This one attorney was placed on private probation by the disciplinary office and the client protection fund paid one unearned retainer claim against her. We normally indicate what level of discipline the respondent attorney received both in our press release and on our website list of all claims paid. In this one instance, we just made no mention of the discipline in the press release, and the website is blank for this one attorney. We did use her name, since the payment of claims is public information and our rules allow the identification of the respondent. We have never had any inquiry about these omissions.

----- Original Message -----

From: "Suzanne Dunn" <sdunn@flabar.org>
Sent: Monday, July 22, 2002 7:59 AM
Subject: Re: Query for listserve-Wisconsin

Florida does not pay unless the attorney has been disbarred, suspended or allowed to resign in lieu of discipline as a result of the claimant's complaint.

Suzanne Dunn
Clients' Security Fund Coordinator
The Florida Bar

-----Original Message-----

From: Sylvia Stevens [SMTP:sstevens@osbar.org]
Sent: Monday, July 22, 2002 10:24 AM
Subject: RE: Query for listserve-Wisconsin

Oregon does not require that the attorney be disbarred, suspended or dead. In most cases, there has been some disciplinary sanction in connection with the loss of client funds. In addition, where the losses are significant, the lawyer may have just disappeared. However, we have paid some claims where the lawyer continued to practice. In the last one, the lawyer received an overpayment from insurance for his fees; his check to the client to reimburse the overpayment bounced and he never made it good. The CSF concluded that he converted the client's funds and paid the claim. No discipline was imposed against the lawyer; he is paying back the CSF in minimal monthly payments.

----- Original Message -----

From: "Bob Welden" <bobw@wsba.org>
Sent: Monday, July 22, 2002 9:10 AM
Subject: Re: Query for listserve-Wisconsin

I am hard pressed to think of any circumstance in which the Washington Fund would pay a claim with a finding of dishonest conduct that would not also involve a disciplinary sanction for the dishonesty -- except where the lawyer was dead. We would not pay a claim simply because a lawyer didn't pay a judgment. That sounds like a collection issue, not dishonest conduct.

Bob Welden
General Counsel
Washington State Bar Association

-----Original Message-----

From: Kathy Peifer [SMTP:kpeifer@palawfund.com]
Sent: Monday, July 22, 2002 10:59 AM
Subject: Re: Query for listserve-Wisconsin

In Pennsylvania, we do not publicize the names the attorneys whose clients have received an award from the Fund.

Kathryn J. Peifer, Executive Director
Pennsylvania Lawyers Fund for Client Security

----- Original Message -----

From: Marbley Green Janet
Sent: Monday, July 22, 2002 9:03 AM
Subject: RE: Query for listserve-Wisconsin

Ohio's rule requires that, for a claim to be eligible for reimbursement, the attorney must be disbarred, suspended, convicted, dead, or resigned. We have never paid a claim that did not meet this requirement.

----- Original Message -----

From: "John S. Gleason" <john.gleason@arc.state.co.us>

Sent: Monday, July 22, 2002 10:21 AM

Subject: Re: Re: Query for listserve-Wisconsin

In Colorado the information on the payout is public...including the name of the attorney respondent. I cannot imagine our Fund paying in a circumstance where there is no discipline. Our Rules and Guidelines require a discipline case.

----- Original Message -----

From: <Tonimoss@aol.com>

Sent: Tuesday, July 23, 2002 4:53 AM

Subject: Re: Fw: Query for listserve-Wisconsin

Maryland just approved two claims at our last meeting against an attorney who was under investigation, but had not been disciplined in any way. We would have published his name anyway, just because we paid the claim. The trustees felt that he had committed a theft and that was all they have to decide. We did notify the attorney grievance commission that these claims had been paid and hoped that maybe it would help in the discipline of the attorney. And in fact it may have because he finally consented to disbarment this past week. Hope this helps. Janet Moss

-----Original Message-----

From: Tim O'Sullivan

Sent: Monday, July 23, 2002 8:37 AM

Subject: Query for listserv

Generally, New York requires that an attorney must be disbarred, suspended, convicted, dead, or a fugitive:

" 7200.8 Eligible claims. (a) The trustees shall consider claims for reimbursement of losses caused by the dishonest conduct of attorneys admitted to practice in New York State, provided that:

(5) unless the trustees decide otherwise, the attorney has been suspended or removed from practice, is dead, or the attorney's whereabouts cannot be determined."

All claim determinations, though, are at the discretion of the Trustees. Failure by an attorney to respond to a reimbursement claim opens the application to approval by the Board if they believe there is sufficient evidence of an eligible loss. The facts relating to an award become a public record and attorneys involved in reimbursement awards are published alphabetically in our Annual Report.

-----Original Message-----

From: Gonzales, Martha [SMTP:Martha.Gonzales@calbar.ca.gov]

Sent: Tuesday, July 23, 2002 10:45 AM

Subject: RE: FW: Listserv Question

In California the fund will pay without discipline if the attorney became a judgment debtor of the applicant in a contested proceeding, or was judged guilty of a crime, and which judgment or judgments shall have been predicated upon dishonest conduct and which judgment or judgments remain unsatisfied in whole or in part. Under the rules, the Commission also has discretion to waive the discipline requirement but has a policy where it will do so only under circumstances such as a "clear case" of misappropriation and discipline proceedings are pending or the attorney has been enrolled inactive under certain sections of the California Rules of Professional Conduct and discipline for various reasons may be delayed indefinitely. In California, even if the attorney was not disciplined, the names of the attorney and the claimant, the amount of the payout and date are public information and the fact

that the fund paid is added to membership records information . However, we are not currently doing monthly press releases and we do not publicize every claim paid. We do not publish the names in our annual report.

-----Original Message-----

From: Karen O'Toole [SMTP:k.otoole@massbbo.org]
Sent: Thursday, July 25, 2002 4:52 PM
Subject: RE: Query for listserve-Wisconsin

In Mass. the Board does not have jurisdiction to hear a claim until the atty. has died, been disbarred, or has been suspended. We have never faced this problem. Of course, the judgment is a matter of public record. Our rules on publicity are quite broad, but I don't think that my Board would publicize such an award assuming that he found itself in the position of Wisconsin's Board. I am not really sure, however.

----- Original Message -----

From: Mary Ann Cummings
Sent: Friday, July 26, 2002 8:27 AM
Subject: RE: FW: Query for listserve-Wisconsin

In B.C. the usual special fund procedure is to wait until discipline is completed, but hardship can require early consideration of a claim. In that case publication would occur after discipline.

REACHING OUT

----- Original Message -----

From: "Karen O'Toole" <k.otoole@massbbo.org>
Sent: Wednesday, January 15, 2003 11:41 AM
Subject: looking for losses

The Chair of the Mass. Clients' Security Board just asked me if I could inquire of other Funds regarding a issue facing the Board currently. In Mass. we have received claims from former clients of a particularly unscrupulous lawyer. These claims total over \$6 million. Based on our review of Bankruptcy Court documents (thief lawyer and his former law firm both filed for bankruptcy protection), it is very likely that there are about 20 former clients who have suffered defalcations. Their total losses probably are between \$6 and \$10 million. The question is, should the Mass. Clients' Security Board "reach out" to these former clients and say, "hey, we think that you may have a loss that is reimbursable by the Mass. CSB, and here is an application if you wish to file a claim for reimbursement." Voila, the CSB is then faced with maybe as high as \$16 million is claims. To keep this is perspective, the Fund awards about \$2 million annually.

Have you ever "reached out" to the community before notifying law clients that they may be able to receive reimbursement for losses caused by their former lawyer. Many thanks for your ideas, guidance, and condolences.

----- Original Message -----

From: "Mark I. Berson" <mark@levywiner.com>
Sent: Wednesday, January 15, 2003 12:12 PM
Subject: Re: looking for losses

Karen, I think we should. Mark

----- Original Message -----

From: "Root Edmonson" <REdmonson@NCBAR.com>

Sent: Wednesday, January 15, 2003 12:14 PM
Subject: Re: looking for losses

In addition to the issue of whether to advise potential applicants that they may have a Fund claim, which I think that you should do, you also have to consider advising the potential applicants that they should file an adversary proceeding in the bankruptcy court to have the Court declare the debts of the lawyer and the firm as non-dischargeable pursuant to 11 U.S.C. Sec. 523(a)(4)&(6). You want to have a non-discharged judgment against the wrongdoers that the applicants can assign to the Fund if the Fund is able to reimburse the losses. Alternatively, the Fund should consider bringing an adversary proceeding seeking non-discharge of all claims that it is aware of. Don't let the wrongdoers walk away without any obligation to reimburse thefts.

----- Original Message -----

From: "Marbley Green Janet" <MarbleyJ@sconet.state.oh.us>
Sent: Wednesday, January 15, 2003 12:42 PM
Subject: RE: looking for losses

This is in response to Karen O'Toole's question. Ohio frequently sends letters to potential claimants advising them that they may submit an application for reimbursement. We have typically had adequate funding to meet the response in those situations. However, there was also a situation where we requested additional funding from the Supreme Court of Ohio, and the request was granted. We had already had several discussions with the Court, however, regarding the attorney and the number of victims.

Janet Green Marbley
Clients' Security Fund of Ohio

----- Original Message -----

From: "Lewis-Koch, Beverly" <BLKoch@aarp.org>
Sent: Wednesday, January 15, 2003 1:58 PM
Subject: RE: looking for losses

I don't recall an instance when the DC Fund approached a claimant. Although, there is nothing in our rules of procedures prohibiting such contacts. Most of our cases are referred to us by Bar Counsel after the attorney is disciplined. I will check with Brenda Catlett, the former administrator of the DC Fund, to get her thoughts on the matter.

----- Original Message -----

From: "Michael D. Miyahira" <miyahira@gte.net>
Sent: Wednesday, January 15, 2003 3:11 PM
Subject: RE: looking for losses

I think that the Mass CSB should. The purpose of each client protection fund is to reimburse client for their attorney's dishonest conduct. If a situation is known, I believe that it would be very appropriate to make the effort to find them and advise them of the CSB and what it can do to assist them.

Michael D. Miyahira

----- Original Message -----

From: "Kathy Peifer" <kpeifer@palawfund.com>

Sent: Wednesday, January 15, 2003 4:21 PM
Subject: Re: looking for losses

I can recall one situation in which the Pennsylvania fund "reached out," The situation involved an attorney who had a very lucrative asbestos litigation practice. His arrangement with the clients was for a 40% contingency fee. He decided that was not enough and kept all of the settlements.

When his conduct caught up with him, our then counsel, Arthur Littleton, worked with the court and the court approved auditors. The auditors determined the settlements that the attorney had received, who had been paid, who had not been paid and the net amounts that should have been paid to each of the clients.

The Fund prepared a letter to each and every one of the clients (there were about 2 thousand), advising them of the situation and the amounts that the auditors had determined had been converted that were due to that particular client. Instead of requiring our normal claim form, the clients had to send in a copy of the letter indicating if they agreed with the information provided or disagreed; if they agreed, they were required to provide verify the personal information that we had, i.e., name, address, SS#, and one proof of ID, such as copy of a birth certificate, photo license, social security card, Medicare card or current passport. If the client had passed away, we required the normal estate documentation. The auditors determined that the Fund's potential exposure was approximately \$3 million. We eventually paid out slightly over \$1.7 million. The remaining money was never claimed.

In other situations, the existence of the Fund was provided to potential claimants by the media and/or the Disciplinary Board or prosecutors.

At the same time the above situation was going on, we had another large situation involving over 100 claimants, with exposure to the Fund finances in excess of \$1 million. Our Supreme Court approved a one time increase in the assessment from \$45 to \$70. After that one time increase, our portion of the assessment returned to \$45 annually and has remained at that rate.

These situations were going on when I was hired by the Fund. What an initiation!!

Please feel free to contact me if you have any questions or would like any additional information.

Kathryn J. Peifer, Esquire
Executive Director
Pennsylvania Lawyers Fund for Client Security

----- Original Message -----

From: "Tim O'Sullivan" <tos@nylawfund.org>
Sent: Thursday, January 16, 2003 11:15 AM
Subject: Re: looking for losses

Hello Karen:

In New York, we make every effort to make client victims aware of the Fund so that they can file with us. The vast majority of our claimants are referred to us by disciplinary and criminal prosecutors who work closely with us. On several occasions, where a lawyer caused many losses, our Fund held a victims meeting in order to provide information and claim forms to prospective claimants. Local District Attorneys and disciplinary committees have worked with us in arranging for these meetings. I do not recall a case where we have had to resort to mailing letters to potential claimants to invite them to file with the Fund. My only reservation would be if the losses were not clearly eligible. For example, do the losses result from investment transactions where the victims may not have been law clients. Before recruiting claimants, I would be more comfortable knowing whether the claimants were law clients who appear to have eligible losses.

Tim O'Sullivan
NY Fund

RESTITUTION TO CLIENTS

ABA/BNA Lawyers' Manual on Professional Conduct

Disciplinary Proceedings

July 31, 2002

REINSTATEMENT: RESTITUTION SHOULD BE PAID TO CLIENT FIRST BEFORE DISCIPLINARY BOARD RECOVERS COSTS

Reinstatement of a suspended lawyer who was ordered to make restitution to her client will not be denied merely because she used up all her ready cash reimbursing the disciplinary panel for its expenses and will not fully reimburse the client for nine years, the Wisconsin Supreme Court ruled July 11 (In re Gilbert, Wis., No. 95-3561, 7/11/02).

The court did remand the case, however, for a hearing on the advisability of expediting restitution payments to the client. It also announced that, from now on, clients must be paid first if there are not enough assets to cover a disciplined lawyer's obligations to both the board and the client.

Restitution Delayed.

In 1999, attorney Jill Gilbert was suspended for two years for taking advantage of an elderly client. In less than six months, Gilbert took \$112,000--which represented more than one-third of the client's total assets--through a series of fraudulent billings and outright misappropriation. According to the court, Gilbert paid herself excessive and unreasonable fees and at one point even used a cashier's check drawn on the client's funds to buy herself a big screen television.

In addition to the two-year suspension, Gilbert was ordered to return \$84,800 plus interest to the client within 60 days, pay the costs of the disciplinary proceeding, which totaled \$51,706.72, and notify her clients of the suspension.

Gilbert paid the expenses incurred by the Board of Attorneys Professional Responsibility. Later, when it became clear that she had exhausted her cash on hand, the board agreed to modify her restitution obligation to the client by allowing her to pay it over a longer period of time.

In May 2001, Gilbert filed for reinstatement. After conducting a hearing, the referee concluded that Gilbert had satisfied the conditions for reinstatement. However, the referee expressed grave concern about the modified restitution agreement. The referee was particularly troubled by the fact that Gilbert's elderly and impecunious victim was only being paid in monthly installments ranging from \$500 to \$1,000 and that, at that rate, it would take Gilbert nine years to satisfy the obligation.

The referee also cited a "dramatic incongruity" between Gilbert's "comfortable suburban lifestyle" and the client's "impoverished and unhappy one." Indeed, the client testified at the reinstatement hearing that he is struggling financially and has had to move from a condominium where he was happy to a small apartment in public housing. "The lurking question," the referee said, "is whether a just regulatory system should leave the parties so disproportionately situated and in particular whether Gilbert should be forced to pay or do more to make the situation right."

The referee also posited that perhaps the board should be required to use all or some portion of the \$51,656.72 it received to better the client's situation.

The referee ultimately recommended that Gilbert be ordered to negotiate a possible modification of the

agreement to provide for faster retirement of her restitution obligation and that she be compelled to make detailed disclosures to the board regarding her financial status.

Clients Should Come First.

In a per curiam opinion, the supreme court as a threshold matter made it clear that whenever a sanctioned lawyer has insufficient resources to satisfy financial obligations to both the disciplinary board and the client, the lawyer should ordinarily pay the client first. If there are grounds to depart from this schedule, the court said, those reasons should be presented to the referee.

Having said that, the court went on to agree with the referee that reinstatement should not be denied here based solely on the court's reservations about the fairness of the restitution agreement.

However, taking the referee's suggestions into consideration, the court specified several conditions that Gilbert must meet in order to be reinstated:

* continuing to comply with the restitution agreement; * meeting with the disciplinary board within six months of her reinstatement, and periodically thereafter, to review and negotiate the possibility of adopting an accelerated restitution schedule; * disclosing to the board annually her income, assets, and net worth, including all W-2s, tax returns, financial statements, and other documentation until her debt to the client is paid; * cooperating fully with any review of the matter conducted by any entity appointed by the court to undertake such a review; and * complying with the current CLE requirements by reporting an additional 30 approved hours, including three hours of legal ethics and professional responsibility if she engages in the active practice of law in Wisconsin.

The court did not take up the referee's suggestion that the board ought to give the client some of the \$51,000 it had collected from Gilbert. It did, however, remand the matter to the referee for a hearing on the advisability of expediting the restitution payments to the client. If the referee determines that the client needs an advocate to represent his interests at this hearing, the court added, then he should advise the court.

The Office of Lawyer Regulation was represented by Thomas J. Basting of Brennan, Steil, Basting & MacDougall, Janesville, Wis., and Jeananne L. Danner and William J. Weigel of the OLR, Madison, Wis. Gilbert, of Milwaukee, represented herself along with Daniel W. Hildebrand of DeWitt Ross & Stevens, Madison. 18 LMPC 452

-----Original Message-----

From: Kenneth.Bossong@judiciary.state.nj.us [SMTP:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Thursday, August 29, 2002 4:30 PM
Subject: Re: Restitution to Clients-18 LMPC 452

Is it me, or is this extraordinarily depressing reading?

- 1) The System keeps its reimbursement for administrative costs while the elderly victim loses his home and goes on relief?
- 2) The Client Protection Fund is never mentioned. Shouldn't it take care of the victim and go after Gilbert? If someone ends up waiting nine years for restitution to trickle in, it should not be the hapless victim who may not have nine years.
- 3) I'm thinking about the judgment of someone who pays administrative costs before a former client she has helped to impoverish. Is this someone ready to resume the practice of law?

Before I blow a gasket, will someone PLEASE tell me that there is more to this story? We cannot abide this.

Ken Bossong

----- Original Message -----

From: Root Edmonson

Sent: Tuesday, September 03, 2002 8:34 AM

Subject: Re: FW: Restitution to Clients-18 LMPC 452

As a disciplinary counsel, as well as counsel to the NC Fund, I can't fathom how an attorney who "took \$112,000--which represented more than one-third of the client's total assets--through a series of fraudulent billings and outright misappropriation" was not disbarred. Like Ken, I also can't understand why the Wisconsin Fund hasn't addressed this claim. The only thing I learned from this opinion is that we certainly aren't billing enough "administrative" costs in our disciplinary hearings.

-----Original Message-----

From: Kris Wenzel [SMTP:kwenzel@wisbar.org]

Sent: Tuesday, September 03, 2002 11:01 AM

Subject: Re: FW: Restitution to Clients-18 LMPC 452

Hi, Ken

The Wisconsin Clients' Security Fund reimbursed the client the maximum allowable based on the date of the theft - \$35,000. This payment was approved and paid on May 28, 1998. In fact, the Fund made the payment prior to a final determination being made on the status of her license to practice law. This decision was made based on the hardship factor of Mr. Geller.

In August of 1999, the Fund was asked by Attorney Gilbert if it would waive its subrogation rights so she could pay the ordered restitution directly to Mr. Geller. Following a conference call with all interested parties, the Fund agreed to waive the subrogation rights and that Ms. Gilbert would reimburse the Fund after making full restitution to Mr. Geller.

The Order reinstating Ms. Gilbert's license to practice law notes in a footnote that the Fund did waive subrogation until the client was paid.

You are right, Ken, in that there is more to this story. Our files are extensive the matter, which began in 1993. Because our Fund relies on the investigation and determinations that come out of a disciplinary investigation, it was waiting for such a determination before approving the claim. As it continued to drag on, the Fund invoked the hardship rule and paid the claimant. Sadly, the theft occurred when our threshold was limited to \$35,000.

The Fund will be repaid when the entire restitution amount, of about \$112,000 including interest, has been paid.

Kris Wenzel
Administrator
Clients' Security Fund
State Bar of Wisconsin

-----Original Message-----

From: Kris Wenzel [SMTP:kwenzel@wisbar.org]

Sent: Tuesday, September 03, 2002 11:23 AM

Subject: RE: FW: Restitution to Clients-18 LMPC 452

Hi, all

Please let me clarify that while the matter began in 1993, a claim was not filed with the Fund until fiscal year 1995.

Kris

-----Original Message-----

From: Gonzales, Martha [SMTP:Martha.Gonzales@calbar.ca.gov]
Sent: Tuesday, September 03, 2002 12:48 PM
Subject: RE: FW: FW: Restitution to Clients-18 LMPC 452

My attorney staff was outraged and thinks that the lawyer involved should have disbarred and jailed. Yet, I understand the issues involved--not that easy. Our fund generally waits until the outcome of discipline, but thankfully our rules allow for waiver of discipline for an early payout if certain criteria are met--and sometimes, in egregious, extreme hardship cases even if the criteria are not met. I am concerned when an application to the fund is filed much later than the underlying discipline complaint. Our discipline offices have a centralized Intake Unit for discipline complaints where potential applicants are supposed to be referred to our fund if there is a potential Client Protection Fund claim. This system usually works well, but it is not perfect. We sometimes get applications that are extreme hardship cases where we may have been able to move had we known about the loss earlier. The downside or upside, depending on how you look at it (I consider it an upside) of an early referral system is that our fund receives a very high volume of applications each year of which 50 percent are usually paid.

----- Original Message -----

From: MillerFG@aol.com
Sent: Tuesday, September 03, 2002 2:30 PM
Subject: Restitution to Clients-18 LMPC 452

Does anyone know why Ms. Gilbert was not prosecuted for her grand larceny?

-----Original Message-----

From: Kenneth.Bossong@judiciary.state.nj.us [SMTP:Kenneth.Bossong@judiciary.state.nj.us]
Sent: Tuesday, September 03, 2002 5:39 PM
Subject: Re: FW: FW: Restitution to Clients-18 LMPC 452

Kris,

I'm not surprised to hear the Fund did everything in its power for this victim, while thwarted to a degree by outside forces and artificial limitations. It's an age-old story for Funds. It's great to hear that your maximum has gone up, twice, in the interim. In at least one respect, you are more "progressive" than we (NJ) are: We would let the victim be made whole first before recovering for the Fund, too, but only as to misappropriated principle - not interest. Another age-old story for Funds is that out of outrage sometimes comes progress. Keep fighting the good fight. Please let someone know if NCPO can help.
Best regards,
Ken Bossong

-----Original Message-----

From: Marbley Green Janet [SMTP:MarbleyJ@sconet.state.oh.us]
Sent: Tuesday, September 03, 2002 5:03 PM
Subject: RE: FW: Restitution to Clients-18 LMPC 452

I agree with both Ken and Root. First and foremost, this attorney should be disbarred. I find it hard to believe that the Court is willing to reinstate someone like this. Where is the Wisconsin Client Protection Fund?

----- Original Message -----

From: Lynda Shely
Sent: Wednesday, September 04, 2002 6:57 AM
Subject: Re: FW: FW: Restitution to Clients-18 LMPC 452

I'm late to this discussion, so please ignore the questions if a prior email answered this, but do any Funds have rules/court orders that routinely provide for restitution to the FUND of administrative costs for processing a claim? And of course this would only be collected if the client(s) have first been repaid completely. If you have Rules on charging administrative costs to Fund respondents, could you please send them along? Are they calculated like discipline costs? We are facing the unfortunate situation where administrative costs for our Fund may eat into our investments - I would rather assess the costs to respondents - again, only if the respondents have first repaid the victims.

Lynda C. Shely
Director of Lawyer Ethics
State Bar of Arizona
602-340-7284

----- Original Message -----
From: Root Edmonson
Sent: Wednesday, September 04, 2002 7:48 AM
Subject: Re: FW: FW: Restitution to Clients-18 LOMPOC 452

NC has no provision for recouping administrative costs from respondents. We only pursue reimbursement for the amount of the claim paid. If the respondent agrees to execute a confession of judgment, it is for that amount. If we have to bring suit, we seek double damages pursuant to a statute.

REVIEWABILITY

----- Original Message -----
From: "Karen O'Toole" <k.otoole@massbbo.org>
Sent: Wednesday, June 04, 2003 2:38 PM
Subject: reviewability

Dear Friends,

The Massachusetts Clients' Security Board has been sued for the second time by an incarcerated claimant who paid a lawyer to handle his criminal appeal. The Board determined that the claimant suffered no loss. The Board's rule provides that the Board's rejection of a claim is final. Unfortunately it does not contain the exact language of the Model Rule that shall be no appeals from a decision from the Board. The Attorney General of Mass. represents the Board. The Board was sued in Superior Court and with GREAT reluctance the A.G. filed a motion to transfer the case to the Supreme Judicial Court - this is the court that established the court. Unfortunately, a single justice denied the motion. The A.G. office asked me to survey my colleagues on the question of whether the decisions of their funds are reviewable. If so by whom? Which court? What is the scope of the review? In addition, if any of you represent funds that have been sued for making or not making an award and wish to share your experience I would be most appreciative.

Karen

----- Original Message -----
From: "Marbley Green Janet" <MarbleyJ@sconet.state.oh.us>
Sent: Wednesday, June 04, 2003 3:19 PM
Subject: Re: reviewability

Ohio's rule provides that the determination of the CSF Board of Commissioners shall be final. Ohio's rule also provides that:

"No claimant or other person shall have any legal interest in the fund or right to receive any portion of the fund, except for discretionary disbursements directed by the Board of Commissioners of the Clients' Security Fund of Ohio, all payments from the fund being a matter of grace and not right."

Ohio's CSF has been sued twice, and in each instance the State Attorney General's office filed a motion to dismiss which was granted. In the most recent case, the claimant filed a multi-defendant complaint in the U.S. District Court, however the complaint was not directly based upon our denial of reimbursement. The Court dismissed the complaint for lack of subject matter jurisdiction. The earlier case was based upon our denial of reimbursement, and it was also dismissed. The file is in storage, and I can't recall the basis for the dismissal. I would be more than happy to retrieve the case file. It normally takes about 3-4 days.

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

----- Original Message -----
From: "William Ricker" <WRicker@Akerman.com>
Sent: Wednesday, June 04, 2003 3:22 PM
Subject: Re: Fw: reviewability

Karen: Florida does not provide for judicial review of a decision, and no one has ever attempted it as far as I know.

----- Original Message -----
From: Dan H.
Sent: Wednesday, June 04, 2003 3:25 PM
Subject: reviewability

Please check out the following case on reviewability and enforcement. I argued the cases so feel free to call me if you have any questions 609-633-2435.

Dan Hendi

GE Capital Mortgage Services, Inc. v. New Jersey
754 A.2d 558
N.J. Super. A.D., 2000.
Decided July 10, 2000. (Approx. 4 pages)

Superior Court of New Jersey,
Appellate Division.
GE CAPITAL MORTGAGE SERVICES, INC., Successor in interest to State Street
Bank & Trust Company, Plaintiff-Appellant,
v.
NEW JERSEY TITLE INSURANCE COMPANY, Robert Nils Herdelin, New Jersey Mortgage &
Investment Corp. and New Jersey Lawyers Fund for Client Protection, Defendants-
Respondents,
and
Joseph Privetera and First American Title Insurance Company, Defendants.
Submitted June 14, 2000.
Decided July 10, 2000.

Mortgage company brought claim against New Jersey Lawyers' Fund for Client Protection after attorney representing home buyer misappropriated proceeds from sale of home on which company held note.

The Superior Court, Chancery Division, Cape May County, dismissed company's complaint for lack of subject matter jurisdiction, and company appealed. On summary disposition, the Superior Court, Appellate Division, King, P.J.A.D., held that company could not bring action against Fund to recover misappropriated funds.

Affirmed.

----- Original Message -----

From: "Tim O'Sullivan" <tos@nylawfund.org>
Sent: Wednesday, June 04, 2003 3:47 PM
Subject: Re: reviewability

Karen:

In New York, our Fund is subject to judicial review. To judicially challenge a final determination by our Trustees a claimant can prosecute an Article 78 proceeding in the appropriate county Supreme Court. The standard of review is whether the Trustees' determination was arbitrary or capricious or had a rational basis. We have a good deal of experience in this area. We have had 6 Article 78 proceedings against our Fund - we have not lost one. I will be glad to share with you our pleadings, etc... if you think they would be of any help.

Tim O'Sullivan

----- Original Message -----

From: "Christopher Blanchard" <Christopher.Blanchard@jud.state.ct.us>
Sent: Wednesday, June 04, 2003 4:25 PM
Subject: RE: reviewability

Connecticut's rules do not provide for judicial review, and specifically state that the decision of the Client Security Fund Committee is final.

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

----- Original Message -----

From: "Root Edmonson" <REdmonson@NCBAR.com>
Sent: Wednesday, June 04, 2003 5:48 PM
Subject: Re: reviewability

After our Fund reimbursed a client \$4,627.43, I wrote the lawyer demanding that he sign a confession of judgment confessing judgment for the amount paid. I further advised the lawyer that, if he refused to sign the confession of judgment, I would file a lawsuit against him seeking double damages (pursuant to a NC statute allowing clients to receive double damages against their attorney). I didn't hear from the lawyer and brought suit seeking double damages. The lawyer then retained counsel who filed an answer claiming that the Fund should not have paid the client since the lawyer had not engaged in "dishonest conduct." The lawyer also filed a four count counterclaim alleging that the State Bar (in their disciplinary action) and the Fund had engaged in vindictive and selective prosecution and had deprived the lawyer of procedural and substantive due process. In replying to the counterclaims relating to the Fund wrongfully reimbursing the client, I moved to dismiss because the state court had no jurisdiction to review the Fund's determination. My motion to dismiss the counterclaims is currently scheduled for hearing in the state court on June 25, 2003. I will let you know how it turns out.

----- Original Message -----

From: "Office of Disciplinary Counsel--Hawaii" <odc@lava.net>
Sent: Wednesday, June 04, 2003 8:54 PM
Subject: Re: reviewability

Fund determinations are not reviewable. Either party can ask for a hearing after notification of the outcome, but the Trustees' decision after the hearing is final.

Carole R. Richelieu
Fund Administrator
Lawyers' Fund for Client Protection
of the Bar of Hawaii

-----Original Message-----

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Thursday, June 05, 2003 10:09 AM
Subject: RE: reviewability

Thanks, Chris. Has your Fund ever been sued by a disgruntled party?

-----Original Message-----

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Thursday, June 05, 2003 10:19 AM
Subject: RE: reviewability

Thanks Tim. I knew that you had a lot of experience in this area. Plus, I think that NY is the ONLY fund that provides for judicial review. Do you know why it was decided that the county Supreme Court and not the Court of Appeals would hear appeals from the Fund? At your LEISURE, could you send me one or two pleadings where you set forth your argument (or the Attorney General's argument) that the Trustees' determination was not arbitrary or capricious? Those pleadings would be helpful. Many thanks.

----- Original Message -----

From: <JBomster@apslaw.com>
Sent: Friday, June 06, 2003 9:38 AM
Subject: Re: reviewability

Karen: New Hampshire Supreme Court Rule 55 provides for review as follows:

"Decisions of the committee as to whether or not to pay claims and the amount of payments shall be within the committee's discretion, subject to the annual limits stated above, and will be reviewable only for clear abuse of discretion. Review of decisions of the committee shall be by a panel of three retired judges, appointed by the New Hampshire Supreme Court, whose decisions shall be final."

So far we have not had an appeal from a committee decision.

Regards:

John Bomster

-----Original Message-----

From: Chris Janku [mailto:cjanku@mobar.org]
Sent: Thursday, June 05, 2003 3:02 PM

Subject: RE: reviewability

The Missouri Bar Client Security Fund has never been sued during the 10+ years I have been the administrator.

-----Original Message-----

From: Karen O'Toole [mailto:k.otoole@massbbo.org]
Sent: Thursday, June 05, 2003 3:15 PM
Subject: RE: reviewability

Good. Does the Missouri Fund have a rule regarding whether its decisions are final?

----- Original Message -----

From: "Marbley Green Janet" <MarbleyJ@sconet.state.oh.us>
Sent: Wednesday, June 04, 2003 3:19 PM
Subject: Re: reviewability

Ohio's rule provides that the determination of the CSF Board of Commissioners shall be final. Ohio's rule also provides that: "No claimant or other person shall have any legal interest in the fund or right to receive any portion of the fund, except for discretionary disbursements directed by the Board of Commissioners of the Clients' Security Fund of Ohio, all payments from the fund being a matter of grace and not right."

Ohio's CSF has been sued twice, and in each instance the State Attorney General's office filed a motion to dismiss which was granted. In the most recent case, the claimant filed a multi-defendant complaint in the U.S. District Court, however the complaint was not directly based upon our denial of reimbursement. The Court dismissed the complaint for lack of subject matter jurisdiction. The earlier case was based upon our denial of reimbursement, and it was also dismissed. The file is in storage, and I can't recall the basis for the dismissal. I would be more than happy to retrieve the case file. It normally takes about 3-4 days.

Janet Green Marbley, Administrator
Clients' Security Fund of Ohio

----- Original Message -----

1. The Washington fund is funded solely by a Supreme Court-ordered annual assessment on all active lawyers (\$13).
2. There is a per claim limit of \$50,000. There is no aggregate lawyer limit.
3. Our rules allow the fund to hold hearings, but in the 15+ years I have been administering it, there has only been 1, at the request of the applicants. The lawyer was invited but did not appear.
4. The fund is managed by a committee who have authority to make gifts up to \$10,000. Anything larger must be approved by the WSBA Board of Governors who are the fund trustees. A decision by either body is final and not subject to review.

Bob Welden
General Counsel
Washington State Bar Association

RISK PROFILING

-----Original Message-----

From: NYLAWFUND [mailto:mjk@nylawfund.org]
Sent: Friday, April 19, 2002 7:46 AM
Subject: Risk Profiling

Attached is a query from Victoria Rees. You can reply directly to the listserv or to me. Thanks for your

help.

"Risk profiling" has been identified as one means to detect and reduce Compensation Fund losses. It involves the compilation and assessment of certain background information on all current practicing lawyers in a jurisdiction, for purposes of targeting certain practitioners and/or firms for 'random' audits, education programs, increased attention, etc. This data includes demographic factors - age, years in practice, areas of law (e.g. estates, personal injury), whether a sole practitioner or in a firm - as well as evidence of financial difficulties (bounced checks, failure to pay annual dues, complaints from creditors), discipline and insurance claims histories, etc.

Does your jurisdiction engage in ANY form of loss prevention/risk management activity such as this? If so, who gathers and assesses the data, and what use is made of this information?

----- Original Message -----

From: "Bob Welden" <bobw@wsba.org>
Sent: Friday, April 19, 2002 8:43 AM
Subject: RE: Risk Profiling

Washington has only had claims from one very closely held corporation that I can recall, and we paid the claim. I think in the case of Boeing (formerly of Washington, now flown to Chicago) or Microsoft or the like, we would consider many of the issues Dan raised about the corporation's business decisions, insurance, etc.

Bob Welden
General Counsel
Washington State Bar Association

----- Original Message -----

From: John S. Gleason
Sent: Monday, April 22, 2002 10:11 AM
Subject: Re: Risk Profiling

Colleagues: Although we maintain most of the information mentioned as a matter of attorney registration and/or attorney regulation matters we do not have a "random audit" program. We do not use the information for any purpose other than registration and regulation matters.

----- Original Message -----

From: <Tonimoss@aol.com>
Sent: Monday, April 22, 2002 11:18 AM
Subject: Re: Risk Profiling

the only risk management that Maryland does is bounced check notification. this goes directly to the Attorney Grievance Commission. Other than that we do no accumulation of numbers as to any risk management.

Janet Moss Clients' Security trust Fund of the Bar of Maryland soon to be known as the Client Protection Fund of the Bar of Maryland - effective July 1, 2002

----- Original Message -----

From: J. Mike Brown
Sent: Monday, April 22, 2002 1:22 PM
Subject: RE: Risk Profiling

Interesting topic for discussion. Seems to me that a cohesive approach by the bar may be in order

because we only deal with one result of possibly predictable lawyer malfunction. Mike

----- Original Message -----

From: Ray Williams
Sent: Monday, April 22, 2002 1:30 PM
Subject: RE: Risk Profiling

We do not have any type of Risk Profiling system in place in Montana. We maintain some of the information described, but only for purposes relating mainly to attorney licensure.

----- Original Message -----

From: Dan H.
Sent: Monday, April 22, 2002 2:01 PM
Subject: Profiling

As I recall, NJ had a process whereby lawyers that could likely cause a loss were treated to audits more often. As the categories were laid out, seemingly at random, the fact of the matter is that solo practitioners in certain type of practices and in certain geographic areas resulted larger than normal number of minority solo practitioners being subject to these "random" audits. As I also recall, it did not set well with the minority Bar and the classifications were changed to address the obvious inequities. Profiling may result in unintended targeting and you should be very careful as to how it is approached. I will try to find the articles if anyone is interested in this wrinkle, previously unforeseen.

Dan Hendi

----- Original Message -----

From: MillerFG@aol.com
Sent: Monday, April 22, 2002 6:44 PM
Subject: Risk Profiling

As a practical matter, it's probably very risky for client protection fund personnel to engage in risk profiling; if only because protection funds, trustees, and staff are so much a part of the legal profession and its institutions, and so very dependent upon their good will, support and revenues. On the other hand, I assume that liability insurance companies engage in risk profiling all the time in their premium-setting function; they just don't shout about it from the roof tops. So it can't be inherently a bad thing; but more a question of who has the power do it and get away with it. I admire the courage of Nova Scotia's Law Society in confronting the issues scientifically. It's indeed a fact that some lawyers are more likely to steal client money than others; and those of us who have experience in the area know what signs to look for and the weight to be given in particular situations. But for lots of reasons, good and bad, it's very risky to use the words "profile" or "profiling" here in the U.S. right now. I hope this contributes to the dialogue. Warm regards to all. Fred Miller

----- Original Message -----

From: "Kenneth Bossong" <Kenneth_Bossong@judiciary.state.nj.us>
Sent: Wednesday, April 17, 2002 1:51 PM
Subject: Risk Profiling -Reply

This is powder keg stuff. Not so much that one would study, and try to prevent, losses, but what one would do with the information that raises grave concerns. Who would argue with making education materials particularly attractive and available to, say, new lawyers if they are the ones seen to be slipping into a particular kind of error?

But targeting folks for a "random" audit? This is exactly what opponents argued would happen when we fought a war to get this through the ABA House of Delegates. There would be no more effective way of

killing this valuable loss-prevention mechanism than to violate the integrity of the random selection. In the early days of random audit in NJ there were two pools of practicing lawyers: A) solo practitioners and B) all others. Picks were made from each pool randomly. Some argued that almost all selections should be from pool A since that is where most defalcations emanated, historically. Indeed audits of pool B were expected to be a waste of time. Well, they weren't a waste of time, though solos are behind most Fund claims. In any event, the debate was strident and brief; the pools were merged. (The irony was that, recognizing that auditing a firm of 90 lawyers is auditing 90 lawyers, firms actually had been slightly over-represented in how it had been managed.)

Note that if a jurisdiction can afford a program comprehensive enough to get to everyone within a few years, that takes the edge off this issue. The randomness of the selection then affects when you are seen, not whether.

Ken Bossong

SUBROGATION

----- Original Message -----

From: "Holtaway, John" <JHoltaway@staff.abanet.org>
Sent: Wednesday, March 05, 2003 10:07 AM
Subject: List serve request-Kris Wenzel-Wisconsin

I am interested in receiving copies of subrogation agreements, especially those that can be reduced to judgment. Thanks much.

Kris Wenzel
Administrator
Clients' Security Fund
State Bar of Wisconsin

----- Original Message -----

From: "Bob Welden" <bobw@wsba.org>
Sent: Thursday, March 06, 2003 11:37 AM
Subject: RE: List serve request-Kris Wenzel-Wisconsin

Here's Washington's agreement.

SUBROGATION AGREEMENT

In consideration of the sum of \$XXX paid by the Washington State Bar Association (hereinafter referred to as "Association") to XXX, hereinafter referred to as "Applicant(s)") for applicant's loss occasioned by or arising out of applicant's representation by lawyer XXX, applicant assigns, transfers, and subrogates to Association all rights, claims, interests and rights of action to the extent of the amount above stated that applicant may have against any party or person who, or firm or corporation that, may be liable for the loss. Applicant authorizes Association to sue, compromise, or settle in applicant's name, and Association is fully substituted for applicant and subrogated to all of applicant's rights to the amount so paid. Any suit brought by Association may be brought in the name of applicant or in the name of Association or both, as Association in its sole judgment shall deem advisable.

In the event that the amount paid by Association to applicant is not payment in full for all loss occasioned by or arising out of applicant's representation by lawyer XXX, then any amount recovered by Association which remains in its hands after reimbursement to Association of the amount paid to applicant, together with its costs of collection, shall be paid over to applicant.

Applicant agrees to cooperate with Association in any efforts by Association in enforcing any claim, demand, cause of action, action, or suit against any party or person, firm or corporation, and agrees that all civil actions to be taken hereunder shall be under the full control of Association and that Association may, as it in its sole judgment deems advisable, prosecute or fail to prosecute, or abandon any such claim, demand, cause of action, action or suit without the necessity of any consent or approval of the undersigned.

Applicant warrants that no settlement has been made with any third party.

It is agreed that any action taken by Association shall be without charge or cost to applicant.

SIGNED AND SWORN to (or affirmed) before me on
by

NOTARY PUBLIC

My appointment expires:

Bob Welden
General Counsel
Washington State Bar Association

----- Original Message -----
From: MillerFG@aol.com
Sent: Thursday, March 06, 2003 12:33 PM
Subject: Re: Fw: List serve request-Kris Wenzel-Wisconsin

I don't believe that subrogation agreements, as such, can be entered as civil judgments in any U.S. jurisdiction. They are contracts between reimbursed clients and client protection funds which transfer the client's rights to the protection fund, usually to the extent of the fund's awards. On the other hand, court rules and statutes can permit orders of restitution to be entered as civil judgments. This is true of both criminal orders of restitution, and orders of restitution handed down by disciplinary courts. In these situations, there has been factfinding by a court or administrative agency which established the defendant's liability to the client, usually by a preponderance of the evidence.

SUBROGATION LITIGATION

----- Original Message -----
From: "Robin Marker" <rmarker@isb.state.id.us>
Sent: Monday, January 27, 2003 10:54 AM
Subject: questions

Dear NCPO members:

Hi, I am the Clerk of the Client Assistance Fund for the Idaho State Bar.

Our Committee members as well as our Assistant Bar Counsel, wanted me to see if I could pick the minds of other NCPO members. So, here we go...

1. Has any Fund filed any type of lawsuit, on behalf of a claimant, against a bank for settlement funds

going through without endorsement of all parties listed on the check? If anyone has filed a lawsuit against a bank for this happening, what type of suit was it, and was it done by Bar Counsel or outside counsel?

2. Has any Fund filed any type of a lawsuit against either a suspended or disbarred attorney for money paid out from the Fund, due to misappropriation of the funds or unearned fees? If so, again what type of suit was it, and was it done by Bar Counsel or outside counsel?

If anyone has any information, or suggestions on where we could obtain some further research, you can either e-mail me, at rmarker@isb.state.id.us or Assistant Bar Counsel, Julia Crossland, at jcrossla@isb.state.id.us.

Thanks in advance for all your help.

Robin Marker
Investigator, Bar Counsel

----- Original Message -----

From: "Root Edmonson" <REdmonson@NCBAR.com>
Sent: Monday, January 27, 2003 11:21 AM
Subject: RE: questions

1) Although I have never filed a lawsuit against a bank for paying a check without proper endorsement, I currently am negotiating with a bank's counsel seeking to have the bank pay several claims without suit.

2) After NC's Client Security Fund reimburses a victim, I write to the lawyer who caused the loss and ask him to sign a confession of judgment for the amount of the loss plus interest. If the lawyer doesn't do so, I file suit against him or her here in Wake County. The lawsuit alleges the facts that caused the loss to the victim, sets out that the CSF reimbursed the victim, and seeks reimbursement from the lawyer pursuant to a subrogation agreement the victim has signed. We ask for double damages pursuant to a NC statute. Most of the time we get a default judgment. Occasionally, we even collect something one of our judgments.

----- Original Message -----

From: "Bob Welden" <bobw@wsba.org>
Sent: Monday, January 27, 2003 12:00 PM
Subject: RE: questions

The WSBA Lawyers' Fund has never sued a bank, but I am negotiating with one now to pay a \$3,000 forged check they cashed. A couple of times we employed outside counsel (and once a collection agency) who filed suit against lawyers who owed the Fund. Only one of them resulted in a small settlement.

Bob Welden
General Counsel
Washington State Bar Association

----- Original Message -----

From: Sylvia Stevens
Sent: Monday, January 27, 2003 12:05 PM
Subject: RE: questions

The Oregon State Bar has filed several suits against suspended/disbarred attorneys to recover

unearned fees. We usually sue for fraud, breach of fiduciary duty and unjust enrichment in addition to breach of contract. My goal is to have a judgment that will survive a Chapter 7 bankruptcy. We have used outside counsel in past years, but for the past 6-8 it has been me (Assistant General Counsel & CSF Administrator). Getting a judgment is rarely the problem, collection is, since most of the lawyers are unemployed/underemployed if they are even around. I also assign some of them to a local collection agency, which has had modest success.

----- Original Message -----

From: Victoria Rees

Sent: Monday, January 27, 2003 12:17 PM

Subject: RE: questions

In Nova Scotia, we have not had to file suit against a bank, but did successfully negotiate for \$168,000 in compensation from them without suit in a matter where a lawyer wrote cheques on an Estate account for which he had no Power of Attorney or authorization to do so by the client. It involved some clear 'lawyer's letters' and a threat of suit. It was a blatant disregard of duties on their employees' part over a period of time.

We have no experience with your second area.

Good luck.

Victoria Rees

----- Original Message -----

From: "John S. Gleason" <john.gleason@arc.state.co.us

Sent: Monday, January 27, 2003 1:36 PM

Subject: Re: questions

Colorado has not pursued a bank, yet, for the endorsement problem. We pursue through outside counsel every attorney respondent. Frankly, we do most of the work in my office and give it to the collection attorney in a nice package. We are actually collecting on a few...just recently we received a \$3,000 reimbursement and a \$1,300 reimbursement. For the new kids on the block that ain't bad....

----- Original Message -----

From: "Tim O'Sullivan" <tos@nylawfund.org

Sent: Monday, January 27, 2003 2:16 PM

Subject: Fw: questions

Dear Robin:

1. The NY Fund regularly pursues banks for honoring forged payee endorsements. Our action alleges a three-year conversion cause of action under UCC 3-419, and if necessary, a six-year breach of contract action for money had and received in common law. We are usually very successful, especially with conversion actions since the drawee bank really has no defense.

While we have not had a missing endorsement action, it is my understanding that a missing endorsement is equivalent to a forged endorsement and the same cause of actions are available. I believe a missing endorsement case is even stronger than a forgery case because you do not have the issue of the genuineness of the endorsement and whether there was authority given to provide the client's endorsement.

2. We usually do not file actions against the dishonest attorney. We rely on judgments obtained by way of criminal or disciplinary restitution orders. When we have brought an action against the lawyer, we

have alleged fraud and conversion.

Our Fund is represented by the State Attorney General's office in our litigation. Our staff used to attempt to negotiate settlements of our forgery claims. Due to our present arrangement with the Attorney General, we now have our Assistant Attorney General pursue recovery. On occasion, we have used outside private counsel for actions against a bank.

Please let me know if you have any questions or if I can be of any help.

Tim O'Sullivan
NY Fund

----- Original Message -----

From: Dan H.
Sent: Monday, January 27, 2003 3:44 PM
Subject: Re: Fw: questions

Dear Colleagues:

A forged indorsement, (that's right always use an "I" for indorsement, when discussing UCC) is the same as a no indorsement. Therefore, when an indorsement is missing, that party's right to the proportionate share of the check remains intact. The issue usually comes up in the context that in a personal injury suit, the check is made payable to the lawyer (whose signature is genuine) and the client (whose signature is forged). We start our argument on the premise that the lawyer was not entitled to anything once he acted contrary to his client's interest and stole the funds. The let the other side prove what the fee/lien arrangement is, but the arrangement is only valid if the lawyer did what he was hired to do, protect the client's legal rights. Rights to fees can be forfeited upon theft.

Dan

ESCROW FUNDS OF SUSPENDED LAWYERS

-----Original Message-----

From: NYLAWFUND [SMTP:mjk@nylawfund.org]
Sent: Wednesday, August 07, 2002 1:04 PM
Subject: Escrow Funds of Disciplined Lawyers

At the ABA/NCPO meeting in Vancouver, several jurisdictions mentioned that they had court rules/procedures in place which governed the disposition or control of escrow funds in the possession of lawyers who are suspended or disbarred. I have New Jersey's rules on the subject. I am interested in finding out what other jurisdictions have in this area and in seeing any such rules/procedures. Thank you.

Tim O'Sullivan
NY Lawyers' Fund

-----Original Message-----

From: Karen O'Toole [SMTP:k.otoole@massbbo.org]
Sent: Wednesday, August 07, 2002 11:26 AM
Subject: RE: Escrow Funds of Disciplined Lawyers

Tim,

In Mass. there are no rules or written procedures; however, when an atty. is about to be

disbarred/suspended and there are client funds in his atty. trust acct. and the atty has no idea which client funds he has on deposit, the Bar Counsel asks the Supreme Judicial Court for an order that allows the client funds to be deposited with the Clients' Security Board regardless of whether there are claims pending against the atty. If (and it has never happened), a client comes forwards and says that the funds held by the CSB are his funds (and can prove it) the CSB would turn over the funds.

About once every two years or so, funds are deposited with the CSB in this situation. The CSB is adamant that it will not receive such funds absent an order from the SJC order their transfer to the CSB.

----- Original Message -----

From: Mary Ann Cummings
Sent: Wednesday, August 07, 2002 9:07 AM
Subject: RE: Escrow Funds of Disciplined Lawyers

Tim

I'll send you B.C.'s legislation, rules & guidelines in this area. They are lengthy, so I will send by mail.

Regards

Mary Ann Cummings

UNEARNED LEGAL FEES #1

----- Original Message -----

From: "Root Edmonson" <REdmonson@NCBAR.com>
Sent: Monday, January 13, 2003 1:38 PM

Lori Meloch and I have agreed to do a presentation on unearned fee claims at the upcoming NCPO workshop in Las Vegas. To help us give a wider overview than NC and CA, please advise me by direct email or by response to the list how your jurisdiction handles most unearned fee claims. If you have specific rules or guidelines relating to unearned fee claims, please attach those or refer me to your rules on the web or other location. Thanks.

Root Edmonson

----- Original Message -----

From: David Shearon
Sent: Monday, January 13, 2003 2:20 PM
Subject: RE: Unearned fee claims

Here's Tennessee's policy:

Payment of Unearned Fee Claims:

(Adopted October 10, 1997)

The Fund will generally reimburse clients for some or all of the fees they paid to an attorney if there has been either:

A pattern of behavior evidencing the lawyer's lack of any good faith intention to perform the services for which the client paid, or

A clear disciplinary violation involving dishonest conduct in one matter resulting in discipline and the inability of the attorney to complete the matters undertaken for other clients.

In refunding fees, the Fund will generally refund the full amount paid to the lawyer less an amount

determined to represent the value to the client of any work done. In the event of the employment or pro bono work of subsequent counsel, the refund will ordinarily be the amount paid for such representation. The Fund will not attempt to improve the "benefit of the bargain" for the client.

I will add that, as a state that requires retainer fees to be placed in the trust account and removed only once a fee has been billed and is not disputed, the attorney's failure to deposit such fees in the trust account is conversion and can justify payment. Of course, pre-paid or lump sum fees do not fall in this category and can be much more difficult to resolve.

David N. Shearon, Esq.
Executive Director
Tennessee Commission on Continuing Legal Education & Specialization

----- Original Message -----
From: Tim O'Sullivan
Tuesday, January 14, 2003 2:32 PM
Subject: RE: Unearned fee claims

Hello Root:

In New York, lawyers are not required to treat advance legal fees as escrow funds. Advance fees are considered to be the lawyer's property upon payment and do not have to be segregated in a trust account and drawn upon only as earned. New York lawyers still though have the professional obligation to refund any unearned fees.

Our Regulations require that a loss be caused by "dishonest conduct". Our Trustees Regulations define "dishonest conduct" as follows. Subsection (e) specifically addresses legal fee claims.

7200.8 Eligible claims. (a) The trustees shall consider claims for reimbursement of losses caused by the dishonest conduct of attorneys admitted to practice in New York State, provided that:

(1) the dishonest conduct alleged in the claim constituted the wrongful taking of money, securities or other property belonging to a law client or other person who entrusted it with an attorney admitted to the practice of law in New York State;

(2) the dishonest conduct occurred in the practice of law by an attorney admitted to practice law in New York State;

(3) the claim is made directly by the client or other person, or their representative;

(4) the loss occurred or was discovered on or after June 1, 1981; and

(5) unless the trustees decide otherwise, the attorney has been suspended or removed from practice, is dead, or the attorney's whereabouts cannot be determined.

(b) The claimant shall have the responsibility to provide satisfactory evidence of an eligible loss.

(c) For the purposes of this section, "dishonest conduct" shall include the misappropriation or wilful misapplication of money, securities or property in the practice of law, and unlawful acts in the nature of theft, larceny, embezzlement, fraud or conversion.

(d) Losses not eligible for reimbursement include damages resulting from an attorney's negligence, malpractice or neglect; losses incurred by government agencies; losses incurred by financial

institutions; losses incurred by business organizations having twenty or more employees; and losses arising from financial transactions with attorneys that do not occur within an attorney-client relationship and the practice of law.

(e) (1) In a loss resulting from an attorney's refusal or failure to refund an unearned legal fee as required by the Lawyer's Code of Professional Responsibility, "dishonest conduct" shall include an attorney's misrepresentation, or false promise, to provide legal services to a law client in exchange for the advance payment of a legal fee.

(2) An attorney's failure to perform or complete a legal engagement shall not constitute, in itself, evidence of misrepresentation, false promise or dishonest conduct.

(3) Reimbursement of a legal fee may be allowed only if: (i) the attorney provided no legal services to the client in the engagement; or (ii) the legal services that the attorney actually provided were, in the trustees' judgment, minimal or insignificant; or (iii) the claim is supported by a determination of a court, a fee conciliation bureau, or an accounting acceptable to the trustees that establishes that the client is owed a refund of a legal fee. No award reimbursing a legal fee shall exceed the actual fee that the client paid the attorney.

(4) In the event that a client is provided equivalent legal services by another attorney without cost to the client, the legal fee paid to the predecessor attorney will not be eligible for reimbursement, except in extraordinary circumstances.

We try to be creative when possible to find dishonest conduct in legal fee claims when we feel the lawyer took advantage of a claimant.

On a few occasions we have had an accused attorney say " I was not dishonest, I was mentally ill or I was a drunk, etc..." We have argued, and our Trustees have agreed, that this is no defense and that we do not have to find a venal intent to grant an award.

We avoid assessing a dollar amount to any work a lawyer does do. We will accept the determination of a fee conciliation bureau, small claims court or other judicial determination.

Please let me know if you have any questions or if I can be of any other assistance.

Thanks, Tim O'Sullivan, NY Fund

----- Original Message -----

From: Lewis-Koch, Beverly

Sent: Tuesday, January 14, 2003 7:26 AM

Subject: RE: Unearned fee claims

In the District of Columbia if it is clear that the attorney took money from a client and did not perform any work, the claim is approved. The DC Fund has had several of these cases involving immigration matters. Clients desperate to obtain green cards for relatives usually paid hefty retainer fees

----- Original Message -----

From: "Christopher Blanchard" <Christopher.Blanchard@jud.state.ct.us

Sent: Tuesday, January 14, 2003 8:10 AM

Subject: unearned fees

In Connecticut, only claims premised on what is defined in our superior court rules as "dishonest conduct" are eligible for reimbursement. Section 2-69(a) of our superior court rules provides that "dishonest conduct" means "wrongful acts committed by an attorney, in an attorney-client relationship

or in a fiduciary capacity arising out of an attorney-client relationship, 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 refusal to refund unearned fees received in advance as required by Rule 1.16(d) of the Rules of Professional Conduct". Our committee ordinarily distinguishes a case of an unearned fee paid in advance from those cases that involve a dispute over the value of services provided, the classic fee dispute.

Christopher G. Blanchard
Assistant Bar Counsel
Staff Attorney/Client Security Fund

----- Original Message -----
From: <JBomster@apslaw.com>
Sent: Tuesday, February 04, 2003 11:34 AM
Subject: Re: Unearned fee claims

Somewhat belatedly: Rule 400.05 of the New Hampshire Court Approved Rules provides as follows:

Unearned Fee. The mere failure of a lawyer to return to a client monies lawfully paid to the lawyer as a fee shall not constitute a theft within the meaning of Rule 55 (the Court Fund Rule) unless the lawyer has:

- (a) performed no work on behalf of the client, and
- (b) taken no action on behalf of the client, and
- (c) obtained no result for the client.

The mere existence of all three of the foregoing factors shall not cause such failure to constitute a theft within the meaning of Rule 56.

Hope this addresses your inquiry. Regards to all John Bomster

----- Original Message -----
From: Victoria Rees
Sent: Monday, February 10, 2003 9:31 AM
Subject: RE: Re: Unearned fee claims

I am also looking for any and all resource information on the subject of unearned/partially earned fee claims, and any criteria setting out when Funds should consider compensation for such claims. So please continue to forward any of the responses to the inquiry below to me, and if you are aware of any other sources of information in this area, I'd be grateful.

Thanks!

UNEARNED LEGAL FEES #2

-----Original Message-----
From: Karen O'Toole [SMTP:k.otoole@massbbo.org]
Sent: Friday, July 12, 2002 5:25 PM
Subject: CPF Inquiry- Massachusetts

There are some jurisdictions that have a rule similar to the Model Rule 10(C)(1) where dishonest conduct includes not just theft, embezzlement, or conversion but refusal to refund unearned fees

received in advance. Could those jurisdictions that have the "refusal to refund unearned fee" component in their rules let me know what your rule says. I am primarily looking for the # of jurisdictions with the refund of unearned fee component, i.e. is it most jurisdictions? just a few?

Your assistance is GREATLY appreciated.

Karen O'Toole

----- Original Message -----

From: Busch, Susan

Sent: Wednesday, July 17, 2002 5:16 AM

Subject: Re: CPF Inquiry- Massachusetts

in Virginia, our rule states: Dishonest conduct means any wrongful act 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, refusal to refund unearned fees received in advance where the lawyer performed no services or such an insignificant portion of service that the refusal to refund the unearned fees constitutes a wrongful taking or conversion of money.

Susan Busch

Assistant Executive Director for Administration

Virginia State Bar

-----Original Message-----

From: Donahue, Eileen [SMTP:edonahue@iardc.org]

Sent: Tuesday, July 16, 2002 10:50 AM

Subject: RE: CPF Inquiry- Massachusetts

In Illinois, our rules do not define dishonest conduct. However, we have adopted a definition as part of our informal policies and that definition has been used over the years in our public reports on claims, so it has something like the effect of case law precedent.

For purposes of our Client Protection Program, "dishonest conduct" is defined as wrongful acts in the nature of theft or embezzlement of money or wrongful conversion of money or property or other things of value including, but not limited to, failure to refund an unearned fee received in advance as required by Rule 1.16(e) of the Illinois Rules of Professional Conduct.

----- Original Message -----

From: Tim O'Sullivan

Sent: Tuesday, July 23, 2002 10:51 AM

Subject: Re: Re: CPF Inquiry- Massachusetts

Karen:

The New York Fund's Regulations do not include in our definition of dishonest conduct the "failure to refund unearned fees paid in advance" language. Our Regulations provide that " In a loss resulting from an attorney's refusal or failure to refund an unearned legal fee as required by the Lawyer's Code of Professional Responsibility, "dishonest conduct" shall include an attorney's misrepresentation, or false promise, to provide legal services to a law client in exchange for the advance payment of a legal fee." It is not a perfect standard, but it has proven to be a workable standard to use in our claims.

Tim O'Sullivan

NY Lawyers' Fund